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THE
LAW REPORTS
1959

House of Lords

and

Judicial Committee of the Privy Council

and

Peerage Cases

London
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FOR ENGLAND AND WALES

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1959

MEMORANDA

1959.

Feb. 6. Lord Blades, *a senator of the College in Scotland, died, aged* 70.

Mar. 10. Dr. Mukund Ramrao Jayakar, *a member of the Judicial Committee of the Privy Council from* 1939–41, *died, aged* 80.

Mar. 24. The Right Hon. Sir David Llewelyn Jenkins, *a Lord Justice of Appeal since* 1949, *was created a Lord of Appeal in Ordinary with the style and title of Baron Jenkins of Ashley Gardens in the City of Westminster.*

Mar. 28. The Hon. Sir Charles Eustace Harman, *a Justice of Her Majesty's High Court of Justice, Chancery Division, was appointed to be one of the Lords Justices of Appeal.*

Apr. 3. Archie Pellow Marshall, Esq., Q.C., *was appointed to be one of the Justices of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, and a knighthood was conferred upon him.*

Apr. 3. Henry Josceline Phillimore, Esq., Q.C., *was appointed to be one of the Justices of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, and a knighthood was conferred upon him.*

Apr. 3. Charles Rodger Noel Winn, Esq., *was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.*

Apr. 3. Mr. Justice Arthian Davies *was transferred from the Probate, Divorce and Admiralty Division to the Queen's Bench Division.*

Apr. 5. Lord Morton of Henryton, *a Lord of Appeal in Ordinary since* 1947, *retired.*

Apr. 14. Charles James Dalrymple Shaw, Esq., Q.C., *was appointed to be one of the senators of the College of Justice in Scotland with title of Lord Kilbrandon.*

May 1. Sir Henry William Barnard, *one of the Justices of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division since* 1944, *retired.*

Aug. 14. Sir Malcolm Hilbery, *one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, was created a Privy Councillor.*

Oct. 21. The Right Hon. Sir Harry Hylton-Foster, Q.C., M.P., *Solicitor-General, resigned on his appointment as Speaker of the House of Commons.*

Oct. 22. Jocelyn Edward Salis Simon, Q.C., M.P., *was appointed Solicitor-General, and knighted.*

The Mode of Citation of the Volumes of the *Law Reports* for 1959 is as follows:

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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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Cole *v.* De Trafford (No. 2)	[1918] 2 K.B. 523		615
Colonial Steamships Ltd. *v.* Kurth Malting Co.	[1954] S.C.R. (Can.) 275		595
Colonial Treasurer *v.* Albury Municipal Council	15 N.S.W.S.R. 320		251
Commissioners for Special Purposes of Income Tax *v.* Pemsel	[1891] A.C. 531; 7 T.L.R. 657	*C.*	439, 454, 455

Commissioners of Inland Revenue *v.* Forrest	15 App.Cas. 334; 6 T.L.R. 456		555
Commissioners of Taxation *v.* Trustees of St. Mark's Glebe	[1902] A.C. 416; 18 T.L.R. 620		251
Commonwealth of Australia *v.* Arklay	87 C.L.R. 159		7
Compania Importadora di Arroces Collette y Kamp S.A. *v.* P. & O. Steam Navigation Co.	28 Ll.L.Rep. 63		582
Compton, *In re*	[1945] Ch. 123; 61 T.L.R. 167; [1945] 1 All E.R. 198	*R.*	455
Compton, *In re*	[1945] Ch. 123; 61 T.L.R. 167; [1945] 1 All E.R. 198		811
Connecticut Fire Insurance Co. *v.* Kavanagh	[1892] A.C. 473; 8 T.L.R. 752	*C.*	54, 69
Cook *v.* Taylor	[1942] Ch. 349; 58 T.L.R. 278; [1942] 2 All E.R. 85		128
Cooper *v.* K. L. Steelfounders and Engineers Ltd.	(1951) Unrep., April 12 (Lynskey J.)		751
Cooper *v.* Swadling	[1930] 1 K.B. 403		64
Cooray *v.* Cooray	30 N.L.R. 310		567
Copal Varnish Co. Ltd., *In re*	[1917] 2 Ch. 349	*R.*	788
Corby *v.* Hill	4 C.B.N.S. 556	*R.*	67
Corrie *v.* MacDermott	[1914] A.C. 1056	*R.*	15
Cowen *v.* Truefitt Ltd.	[1899] 2 Ch. 309		143
Cox, decd., *In re*, Baker *v.* National Trust Co. Ltd.	[1955] A.C. 627; [1955] 3 W.L.R. 42; [1955] 2 All E.R. 550		446
Coxen, *In re*	[1948] Ch. 747; [1948] 2 All E.R. 492		464
Cranston, *In re*, Webb *v.* Oldfield	[1898] 1 I.R. 431	*R.*	315
Crookall *v.* Vickers-Armstrong Ltd.	[1955] 1 W.L.R. 659; [1955] 2 All E.R. 12		747
Cunliffe *v.* Goodman	[1950] 2 K.B. 237; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720	*Appr.*	21, 34, 37
Currie *v.* Misa	L.R. 10 Ex. 153		74
Curtis Brown Ltd. *v.* Jarvis	14 T.C. 744	*R.*	425
C. Wilh. Svenssons Travaruaktiebolag *v.* Cliffe Steamship Co.	[1932] 1 K.B. 490		598
Dalton *v.* Henry Angus & Co.	6 App.Cas. 740	*R.*	643
Dalziel Co-operative Society *v.* Motherwell Assessor	1932 S.C. 413	*R.*	242
Dartadeen *v.* Watson	(1937) 3 J.L.R. 87	*C.*	721, 742
Davie *v.* New Merton Board Mills Ltd.	[1957] 2 Q.B. 368; [1957] 2 W.L.R. 747; [1957] 2 All E.R. 38, 384; [1958] 1 Q.B. 210; [1958] 2 W.L.R. 21; [1958] 1 All E.R. 67	*Aff.*	605
Davies *v.* Braithwaite	[1931] 2 K.B. 628; 47 T.L.R. 479		417
Davies *v.* Davies	38 Ch.D. 499		378
Davies *v.* Price	[1958] 1 W.L.R. 434; [1958] 1 All E.R. 671	*R.*	696

Dean, *In re*	41 Ch.D. 552; 5 T.L.R. 404	*R.*	484
Dean's Will Trusts, *In re*	66 T.L.R. (Pt. 1) 728; [1950] 1 All E.R. 882		464
De Beauvoir *v.* Welch	7 B. & C. 266		468
Delacour *v.* Waddington	89 C.L.R. 117		279
Derbyshire Miners' Welfare Committee *v.* Skegness Urban District Council	[1958] 1 Q.B. 298; [1957] 3 W.L.R. 1049; [1957] 3 All E.R. 692		544
De Reneville *v.* De Reneville	[1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56	*R.*	112
Derry *v.* Peek	14 App.Cas. 337; 5 T.L.R. 625	*Appl.*	791, 806
Dill *v.* Watson	2 Jones 48		447
Dimes *v.* Grand Junction Canal	3 H.L.C. 759	*R.*	112
Director of Public Prosecutions *v.* Head	[1958] 1 Q.B. 132; [1957] 3 W.L.R. 862; [1957] 3 All E.R. 426	*Aff.*	85
Dobell (G. E.) & Co. *v.* Steamship Rossmore Co. Ltd.	[1895] 2 Q.B. 408; 11 T.L.R. 501	*R.*	602
Dominion Glass Co. Ltd. *v.* The Ship Anglo-Indian	[1944] S.C.R. (Can.) 409		599
Doncaster Union Assessment Committee *v.* Manchester, Sheffield and Lincolnshire Railway Co.	71 L.T. 585; 10 T.L.R. 567		252
Donnelly *v.* Glasgow Corporation	1953 S.C. 107	*O.*	605, 617, 625, 641, 647, 652, 653
Donoghue *v.* Stevenson	[1932] A.C. 562; 48 T.L.R. 494	*R.*	616
Drummond, *In re*	[1914] 2 Ch. 90; 30 T.L.R. 429	*C.*	459, 479, 480, 482–484
Drummond *v.* British Building Cleaners Ltd.	[1954] 1 W.L.R. 1434; [1954] 3 All E.R. 507		751
Drummond *v.* Collins	[1915] A.C. 1011; 31 T.L.R. 482		120
Duncan *v.* Adamson	[1935] A.C. 398; 51 T.L.R. 325		120
Dunlop Pneumatic Tyre Co. Ltd. *v.* Selfridge & Co. Ltd.	[1915] A.C. 847; 31 T.L.R. 399		74
Dunn *v.* Lareau	57 L.J.P.C. 108		724
Dunne *v.* Byrne	[1912] A.C. 407; 28 T.L.R. 257		303
Dunster *v.* Abbott	[1954] 1 W.L.R. 58; [1953] 2 All E.R. 1572		58
Earl Fitzwilliam's Agreement, *In re*	[1950] Ch. 448; 66 T.L.R. (Pt. 1) 174; [1950] 1 All E.R. 191		279
Easson *v.* London & North Eastern Railway Co.	[1944] K.B. 421; 60 T.L.R. 280; [1944] 2 All E.R. 425	*R.*	759
Easwest Produce Co. *v.* The Ship S.S. Nordnes	[1956] Exch.Ct. (Can.) 328		595
Edwards *v.* Martin	25 L.J.Ch. 284		524
Edwards *v.* National Coal Board	[1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743		700
Egmont (Earl of) *v.* Smith	6 Ch.D. 469	*Appl.*	125, 132
Elder *v.* Elder and Watson	1952 S.C. 49	*R.*	364

Elderslie Steamship Co. Ltd. *v.* Borthwick	[1905] A.C. 93; 21 T.L.R. 277	*R.*	175
Elliot *v.* National Coal Board	1956 S.C. 484	*O.*	698, 706, 709, 712
Ellis *v.* Fulham Borough Council	[1938] 1 K.B. 212; 53 T.L.R. 884; [1937] 3 All E.R. 454	*R.*	69
England *v.* National Coal Board	[1953] 1 Q.B. 724; [1953] 2 W.L.R. 1059; [1953] 1 All E.R. 1194; [1954] A.C. 403; [1954] 2 W.L.R. 400; [1954] 1 All E.R. 546		748
Escoigne Properties Ltd. *v.* Inland Revenue Commissioners	[1958] A.C. 549; [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406	*R.*	240
Esso Petroleum Co. Ltd. *v.* Southport Corporation	[1956] A.C. 218; [1956] 2 W.L.R. 81; [1955] 3 All E.R. 864	*R.*	691
Everett *v.* Griffiths	[1921] 1 A.C. 631; 37 T.L.R. 481	*R.*	112
Europa, The	[1908] P. 84; 24 T.L.R. 151		597
Excelsior Wire Rope Co. *v.* Callan	[1930] A.C. 404	*R.*	67
Fairman *v.* Perpetual Investment Building Society	[1923] A.C. 74; 39 T.L.R. 54		61
Fanton *v.* Denville	[1932] 2 K.B. 309; 48 T.L.R. 433	*R.*	621
Farquhar *v.* Chance Brothers Ltd.	[1951] 2 T.L.R. 666; [1951] W.N. 442		752
Faulconbridge *v.* National Employers' Mutual General Insurance Association Ltd.	33 T.C. 103	*R.*	319
Faulder *v.* Silk	3 Camp. 126	*R.*	107
Ferguson *v.* Anon.	2 Esp. 590	*R.*	407
Ferguson *v.* North British Railway Co.	1915 S.C. 566		260
Fernando *v.* Jokins	30 N.L.R. 274		567
Fibrosa Spolka Akcyjna *v.* Fairbairn Lawson Combe Barbour Ltd.	[1943] A.C. 32		730
Finch *v.* Telegraph Construction and Maintenance Co. Ltd.	65 T.L.R. 153; [1949] 1 All E.R. 452		747
Fisher *v.* Jackson	[1891] 2 Ch. 84		452
Fisher *v.* Taylors Furnishing Stores Ltd.	[1956] 2 Q.B. 78; [1956] 2 All E.R. 78	*Appr.*	22, 44, 45, 49, 53
Fleet Electrics Ltd. *v.* Jacey Investments Ltd.	[1956] 1 W.L.R. 1027; [1956] 3 All E.R. 99		25
Flint *v.* Warren	15 Sim. 626		447
Fonseka *v.* Silva	1 C.L.J. 46		567
Forbes *v.* Gitt	[1922] 1 A.C. 256		523
Forrest, In the Will of	[1913] V.L.R. 425		465
Forsaith, *In re*	26 N.S.W.S.R. 613	*O.*	273, 284, 285, 287–289, 292
Forth Conservancy Board *v.* Inland Revenue Commissioners	[1931] A.C. 540; 47 T.L.R. 429		203
Franks, *In re*	[1948] Ch. 62; 63 T.L.R. 583; [1947] 2 All E.R. 638		276

Fraser *v.* City of Fraserville	[1917] A.C. 187; 33 T.L.R. 179		11
Fuggle (R. F.) Ltd. *v.* Gadsden	[1948] 2 K.B. 236; 64 T.L.R. 364; [1948] 2 All E.R. 160	*R.*	51
Fullers Ltd. *v.* Squire	[1901] 2 K.B. 209		222
Gavin *v.* W. T. Rogers & Co.	17 R. 206	*R.*	651
General Assembly of Free Church of Scotland *v.* Lord Overtoun	[1904] A.C. 515; 20 T.L.R. 730		446
General Cleaning Contractors Ltd. *v.* Christmas	[1953] A.C. 180; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110	*R.*	757
General Medical Council *v.* Inland Revenue Commissioners	97 L.J.K.B. 578; 44 T.L.R. 439	*Appr.*	541, 550, 554–557, 562, 564
General Nursing Council for England and Wales *v.* St. Marylebone Borough Council	[1958] Ch. 421; [1957] 3 W.L.R. 1039; [1957] 3 All E.R. 685	*R.*	310
General Nursing Council for England and Wales *v.* St. Marylebone Borough Council	[1957] 1 W.L.R. 941; [1957] 2 All E.R. 791; [1958] Ch. 421; [1957] 3 W.L.R. 1039; [1957] 3 All E.R. 685	*Aff.*	541
General Nursing Council for Scotland *v.* Inland Revenue Commissioners	1929 S.C. 664; 14 T.C. 645	*Appr.*	541, 550, 554, 555, 557–559, 564
Gerloff, *In re*	[1941] S.A.S.R. 156	*R.*	289
Gibaud *v.* Great Eastern Railway Co.	[1921] 2 K.B. 426; 37 T.L.R. 422		581
Gibbs *v.* Messer	[1891] A.C. 248		729
Gilbert (Valuation Officer) *v.* Hickinbottom & Sons Ltd.	[1956] 2 Q.B. 40; [1956] 2 W.L.R. 952; [1956] 2 All E.R. 101	*R.* *R.*	241 242
Gillingham Bus Disaster Fund, *In re*	[1958] Ch. 300; [1957] 3 W.L.R. 1069; [1958] 1 All E.R. 37; [1959] Ch. 62; [1958] 3 W.L.R. 325; [1958] 2 All E.R. 749		465
Gilmour *v.* Coats	[1949] A.C. 426; 65 T.L.R. 234; [1949] 1 All E.R. 848		300
Gilmour *v.* Coats	[1949] A.C. 426; 65 T.L.R. 234; [1949] 1 All E.R. 848		446
Glasgow Corporation *v.* Muir	[1943] A.C. 448; 59 T.L.R. 266; [1943] 2 All E.R. 44		747
Glasgow Corporation *v.* Taylor	[1922] 1 A.C. 44		64
Glasier *v.* Rolls	42 Ch.D. 436; 5 T.L.R. 691	*Appl.*	791, 806
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Glenochil, The	[1896] P. 10		596
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Glyn Mills Currie & Co. *v.* East and West India Dock Co.	7 App.Cas. 591		583

Glynn *v.* Margetson & Co.	[1893] A.C. 351; 9 T.L.R. 437	*R.*	158, 166, 167, 174, 175
Glynn *v.* Margetson & Co.	[1893] A.C. 351; 9 T.L.R. 437	*Appl.*	577, 587
Golodetz *v.* Kersten, Hunik & Co.	24 Ll.L.Rep. 374	*R.*	158, 164, 165, 183, 184
Goodison *v.* Williams	(1931) Clark's Rep. (Jamaica) 349	*O.*	721, 741, 742
Goodman *v.* Mayor of Saltash	7 App.Cas. 633		445
Goodrich *v.* Paisner	[1957] A.C. 65; [1956] 2 W.L.R. 1053; [1956] 2 All E.R. 176	*R.*	247
Gosse Millerd Ltd. *v.* Canadian Government Merchant Marine Ltd.	[1927] K.B. 432; 43 T.L.R. 544; [1929] A.C. 223; 45 T.L.R. 63		595
Gott, *In re*	[1944] Ch. 193; 60 T.L.R. 214; [1944] 1 All E.R. 293		447
Gough *v.* National Coal Board	[1957] 1 W.L.R. 973; [1957] 3 All E.R. 368n.; [1959] 1 Q.B. 189; [1958] 2 W.L.R. 735; [1958] 1 All E.R. 754	*Rev.*	699
Goulandris Brothers Ltd. *v.* B. Goldman & Sons Ltd.	[1958] 1 Q.B. 74; [1957] 3 W.L.R. 596; [1957] 3 All E.R. 100		148
Gould *v.* Bacup Local Board	50 L.J.M.C. 44		120
Governments Stock and Other Securities Investment Co. Ltd. *v.* Christopher	[1956] 1 W.L.R. 237; [1956] 1 All E.R. 490		800
Grace Bros. Pty. Ltd. *v.* The Commonwealth	72 C.L.R. 269		9
Grant *v.* Sun Shipping Co. Ltd.	[1948] A.C. 549; [1948] 2 All E.R. 238		57
Green *v.* Fibreglass Ltd.	[1958] 2 Q.B. 245; [1958] 3 W.L.R. 71; [1958] 2 All E.R. 521		614
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Green (H. E.) & Sons *v.* Minister of Health	[1948] 1 K.B. 34; [1947] 2 All E.R. 469		304
Greene *v.* Home Secretary	[1942] A.C. 284; 58 T.L.R. 53; [1941] 3 All E.R. 388	*R.*	107, 108
Greg *v.* Planque	[1936] 1 K.B. 669		262
Griffin *v.* London Transport Executive	[1950] 1 All E.R. 716		262
Griffiths, *In re*	[1926] V.L.R. 212		465
Gutteridge *v.* Munyard	1 Moo. & R. 334; 7 Car. & P. 129	*R.*	394
Hall *v.* Derby Sanitary Authority	16 Q.B.D. 163; 2 T.L.R. 81		811
Hall & Co. Ltd. *v.* South-East Area of Surrey Assessment Committee	4 D.R.A. 29	*Appl.*	214, 229, 238, 246
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Hannetta Ltd., *In re*	(1953) Nov. 2 (unreported); 216 L.T.J. 639		333
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Harris *v.* Associated Portland Cement Manufacturers Ltd.	[1939] A.C. 71; 55 T.L.R. 302; [1938] 4 All E.R. 831	*R.*	761
Harris *v.* Jones	1 Moo. & R. 173		377
Harvey *v.* Rex	[1901] A.C. 601; 17 T.L.R. 601	*R.*	109
Haseldine *v.* C. A. Daw & Son Ltd.	[1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156		608
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Hirji Mulji *v.* Cheong Yue Steamship Co. Ltd.	[1926] A.C. 497; 42 T.L.R. 359		582
Hivac Ltd. *v.* Park Royal Scientific Instruments Ltd.	[1946] Ch. 169; 62 T.L.R. 231; [1946] 1 All E.R. 350	*R.*	367
Hoare *v.* Hoare	56 L.T. 147		446
Hobourn Aero Components Ltd.'s Air Raid Distress Fund, *In re*	[1946] Ch. 194; 62 T.L.R. 313; [1946] 1 All E.R. 501		304, 443, 811
Hodgson *v.* British Arc Welding Co. Ltd.	[1946] K.B. 302; 62 T.L.R. 275; [1946] 1 All E.R. 95		608
Hole *v.* Sittingbourne and Sheerness Railway Co.	6 H. & N. 488		616
Hollole, *In re*	[1945] V.L.R. 295	*Appr.*	458, 475
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Honeywill and Stein Ltd. *v.* Larkin Brothers (London's Commercial Photographers) Ltd.	[1934] 1 K.B. 191; 50 T.L.R. 56		613
Hontestroom, The	[1927] A.C. 37; 42 T.L.R. 741	*R.*	806
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Ingram, *In re*	[1951] V.L.R. 424		465
Inland Revenue Commissioners *v.* Baddeley	[1955] A.C. 572; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525	*R.*	310, 314, 322
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Income Tax Special Commissioners *v.* Linsleys (Established 1894) Ltd.	[1958] A.C. 569; [1958] 2 W.L.R. 292; [1958] 1 All E.R. 343	*R.*	209
Inland Revenue Commissioners *v.* Sangster	[1920] 1 K.B. 587; 36 T.L.R. 158	*R.*	425
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Karsales (Harrow) Ltd. *v.* Wallis	[1956] 1 W.L.R. 936; [1956] 2 All E.R. 866	*R.*	588
Karunaratne *v.* Ferdinandus	[1902] A.C. 405		191
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Kiashek, *In re*	71 R.P.C. 453		668
Kimpson *v.* Markham	[1921] 2 K.B. 157; 37 T.L.R. 342	*R.*	51
Kinlyside *v.* Thornton	2 W.Bl. 1111	*R.*	407
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Kish (J. & E.) *v.* Charles Taylor, Sons & Co.	[1912] A.C. 604; 28 T.L.R. 425		597
Knowles *v.* Newcastle Corporation	9 C.L.R. 534		250
Kwaku Mensah *v.* The King	[1946] A.C. 83		536
Lake *v.* Dean	28 Beav. 607		128
Landauer *v.* Asser	[1905] 2 K.B. 184; 21 T.L.R. 429	*R.*	690
Lang *v.* Purves	2 Legge 955; 15 Moo.P.C. 389		447
Larkin, *In re*	[1957] S.R. (N.S.W.) 369		280
Latham *v.* R. Johnson & Nephew Ltd.	[1913] 1 K.B. 398; 29 T.L.R. 124	*Appl.*	54, 66–68
Latimer *v.* A.E.C. Ltd.	[1953] A.C. 643; [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449	*R.*	757
Laverty *v.* Laverty	[1907] 1 I.R.Ch. 9		443
Lawrence *v.* Inland Revenue Commissioners	23 T.C. 333		417

Lazarus Estates Ltd. *v.* Beasley	[1956] 1 Q.B. 702; [1956] 1 All E.R. 341	*R.*	51
Leavey (J.) & Co. Ltd. *v.* G. H. Hirst & Co. Ltd.	[1944] K.B. 24; 60 T.L.R. 721; [1943] 2 All E.R. 581		76
Leeder *v.* Ellis	[1953] A.C. 52; [1952] 2 All E.R. 814		276
Leeds Shipping Co. Ltd. *v.* Duncan Fox & Co. Ltd.	37 Com.Cas. 213		146
Lees *v.* Tod	9 Rettie 807	*Appl.*	791, 806
Leighton *v.* Leighton	1 Str. 308	*R.*	112
Lek *v.* Mathews	29 Ll.L.Rep. 141		800
Lemm *v.* Federal Commissioner of Taxation	66 C.L.R. 399		469
Lennard's Carrying Co. Ltd. *v.* Asiatic Petroleum Co. Ltd.	[1915] A.C. 705; 31 T.L.R. 294		597
Lister *v.* Lane & Nesham	[1893] 2 Q.B. 212; 9 T.L.R. 503		378
Liverpool and London and Globe Insurance Co. *v.* Bennett	[1913] A.C. 610; 29 T.L.R. 757		302
Liverpool and London and Globe Insurance Co. *v.* Bennett	[1912] 2 K.B. 41; 28 T.L.R. 279; [1913] A.C. 610; 29 T.L.R. 757		416
Liverpool Corporation *v.* Chorley Union Assessment Committee and Withnell Overseers	[1911] 1 K.B. 1057; 27 T.L.R. 230; [1912] 1 K.B. 270; 28 T.L.R. 177; [1913] A.C. 197; 29 T.L.R. 246		251
Lloyd *v.* Grace, Smith & Co.	[1912] A.C. 716; 28 T.L.R. 547		584, 614
Lochgelly Iron and Coal Co. Ltd. *v.* McMullen	[1934] A.C. 1; 49 T.L.R. 566	*R.*	760
London and North Western Railway Co. *v.* Neilson	[1922] 2 A.C. 263; 38 T.L.R. 653		583
London Co-operative Society Ltd. *v.* Southern Essex Assessment Committee	[1942] 1 K.B. 53; [1942] 3 All E.R. 252	*R.*	241
London County Council *v.* Attorney-General	[1901] A.C. 26; 17 T.L.R. 131	*R.*	511
London County Council *v.* Hackney Borough Council	[1928] 2 K.B. 588; 44 T.L.R. 592		253
London Graving Dock Co. Ltd. *v.* Horton	[1950] 1 K.B. 421; [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1		62
London Investment and Mortgage Co. Ltd. *v.* Worthington (Inspector of Taxes)	[1957] 1 W.L.R. 116; [1957] 1 All E.R. 277	*Aff.*	201
London Transport Executive *v.* Betts	[1957] 1 W.L.R. 988; [1957] 3 All E.R. 126	*Aff.*	214
London Passenger Transport Board *v.* Railway Assessment Authority	13 D.R.A. 64	*R.*	229, 246
London Passenger Transport Board *v.* Upson	[1949] A.C. 155; 65 T.L.R. 9; [1949] 1 All E.R. 60		57
Longdon-Griffiths *v.* Smith	[1951] 1 K.B. 295; 66 T.L.R. (Pt. 2) 627; [1950] 2 All E.R. 662	*R.*	318

Lord Howard de Walden *v.* Inland Revenue Commissioners	[1947] 2 All E.R. 502; [1948] 2 All E.R. 825; 30 T.C. 345	*R.*	503–505, 508
Lowry *v.* Consolidated African Selection Trust Ltd.	[1940] A.C. 648; 56 T.L.R. 735; [1940] 2 All E.R. 545	*R.*	366
Lyle & Scott Ltd. *v.* Scott's Trustees	1958 S.C. 230	*Rev.*	764
Macaulay's Estate, *In re*	[1943] Ch. 435n.	*Appl.*	459, 482, 485
McCarthy *v.* Lewis	[1957] 1 Q.B. 475; [1957] 2 W.L.R. 300; [1957] 1 All E.R. 556		702
Macdonald *v.* Andrew Wyllie & Son	1 F. 339	*R.*	639, 640, 650, 653
Macduff, *In re*	[1896] 2 Ch. 451; 12 T.L.R. 452		449
McFadden *v.* Blue Star Line	[1905] 1 K.B. 697; 21 T.L.R. 345		598
McKenna *v.* Porter Motors Ltd.	[1956] A.C. 688; [1956] 3 All E.R. 262	*R.*	37
M'Killop *v.* North British Railway Co.	23 R. 768	*R.*	639
McLean *v.* Burrangong Shire Council	14 N.S.W.S.R. 291		251
McPherson *v.* McPherson	[1936] A.C. 177; 52 T.L.R. 166	*R.*	112
MacPherson *v.* Sutherland	6 N.S.W.R.Eq. 114		447
Madras Electric Supply Corporation *v.* Boarland	[1955] A.C. 667; [1955] 2 W.L.R. 631; [1955] 1 All E.R. 753		489
Magor and St. Mellons Rural District Council *v.* Newport Corporation	[1952] A.C. 189; [1951] 2 T.L.R. 935; [1951] 2 All E.R. 839	*R.*	247
Mahlikilili Dhalamini *v.* The King	[1942] A.C. 583; [1943] 1 All E.R. 463		536
Mandavia *v.* Income Tax Commissioner	23 E.A.C.A. 303	*Rev.*	115
Mantz *v.* Goring	4 Bing.N.C. 451		378
March *v.* Thomas	Unrep., March 12, 1917 (Sup.Ct. of Jamaica)		729
Marsden *v.* Edward Heyes Ltd.	[1927] 2 K.B. 1	*R.*	407
Marshall *v.* Gotham Co. Ltd.	[1954] A.C. 360; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937	*R.*	713, 716
Marshall *v.* Minister of Works	[1950] N.Z.L.R. 339		8
Marshalsea, The Case of the	10 Co.Rep. 68b	*R.*	112
Marshment *v.* Borgstrom	[1942] S.C.R. (Can.) 374		609
Mason *v.* Williams & Williams Ltd.	[1955] 1 W.L.R. 549; [1955] 1 All E.R. 808	*Appr.*	605, 617, 626, 648
Maxine Footwear Co. Ltd. *v.* Canadian Government Merchant Marine Ltd.	[1957] S.C.R. 801	*Rev.*	590
Mercer *v.* Denne	[1905] 2 Ch. 538; 21 T.L.R. 760	*R.*	691
Mersey Docks and Harbour Board *v.* Procter	[1923] A.C. 253; 39 T.L.R. 275		798

Meyer *v.* Scottish Textile and Manufacturing Co. Ltd.	1954 S.C. 381; 1957 S.C. 110; 1957 S.L.T. 250	*Aff.*	325
Miller *v.* South of Scotland Electricity Board	1958, H. of L., unreported		57
Minister for Public Works *v.* Thistlethwayte	[1954] A.C. 475; [1954] 2 All E.R. 843		7
Minister of Food *v.* Reardon Smith Line Ltd.	[1951] 2 Lloyd's Rep. 265; [1951] 2 T.L.R. 1158		597
Minister of Food *v.* Reardon Smith Line Ltd.	[1951] 2 T.L.R. 1158		146
Mississippi Steamship Co. *v.* S.S. Del Sud	[1959] A.M.C. 653		594
Molloy, *In re*	28 N.S.W.S.R. 546	*R.*	289
Morice *v.* Bishop of Durham	9 Ves. 399; 10 Ves. 522	*C.*	459, 484 545
Morison, Pollexfen & Blair Ltd. *v.* Walton	(1909) May 10 (unreported)	*R.*	367
Morley *v.* Tattersall	108 L.J.K.B. 11; 54 T.L.R. 923; [1938] 3 All E.R. 296		203
Morris *v.* Luton Corporation	[1946] K.B. 114; 62 T.L.R. 145; [1946] 1 All E.R. 1	*R.*	761
Morris *v.* West Hartlepool Steam Navigation Co. Ltd.	[1956] A.C. 552; [1956] 1 W.L.R. 177; [1956] 1 All E.R. 385		749
Mouat *v.* Betts Motors Ltd.	[1957] N.Z.L.R. 380	*Aff.*	72
Mourton *v.* Poulter	[1930] 2 K.B. 183; 46 T.L.R. 256	*R.*	67
Murdock *v.* A. & R. Scott	1956 S.C. 309		61
Murray *v.* Murray	[1941] P. 1; 56 T.L.R. 955; [1940] 4 All E.R. 250	*R.*	113
Nash *v.* Hollinshead	[1901] 1 K.B. 700; 17 T.L.R. 352		302
National Anti-Vivisection Society *v.* Inland Revenue Commissioners	[1948] A.C. 31; 63 T.L.R. 424; [1947] 2 All E.R. 217		304
National Deposit Friendly Society Trustees *v.* Skegness Urban District Council	[1957] 2 Q.B. 573; [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199	*Aff.*	295
National Deposit Friendly Society Trustees *v.* Skegness Urban District Council	[1957] 2 Q.B. 573; [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199; [1959] A.C. 293; [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601	*C.*	541, 563
National Deposit Friendly Society Trustees *v.* Skegness U. D. C.	[1959] A.C. 293; [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601	*R.*	827, 828
National Telephone Co. Ltd. *v.* Postmaster-General	[1913] A.C. 546; 29 T.L.R. 636		658

Nelson Line (Liverpool) Ltd. *v.* James Nelson & Sons Ltd.	[1907] 1 K.B. 769; 23 T.L.R. 302; [1908] A.C. 16; 24 T.L.R. 114	*R.*	158, 161, 162, 167, 175, 187
Nelson Line (Liverpool) Ltd. *v.* James Nelson & Sons Ltd.	[1908] A.C. 16; 24 T.L.R. 114		581
New Eberhardt Co., *In re, ex p.* Menzies	43 Ch.D. 118; 5 T.L.R. 617		567
New York Life Insurance Co. *v.* Styles	14 App.Cas. 381; 5 T.L.R. 621	*Appl.*	294, 309, 318
Newcastle Breweries Ltd. *v.* Inland Revenue Commissioners	96 L.J.K.B. 735; 43 T.L.R. 476	*C.*	201, 206
Newcastle City Council *v.* Royal Newcastle Hospital	96 C.L.R. 493	*Aff.*	248
Ng *v.* The Queen	[1958] A.C. 173; [1958] 2 W.L.R. 599		794
Nickell *v.* Windsor	[1927] 1 D.L.R. 379		59
Nicholls *v.* F. Austin (Leyton) Ltd.	[1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92		613
Nicolene Ltd. *v.* Simmonds	[1953] 1 Q.B. 543; [1953] 2 W.L.R. 717; [1953] 1 All E.R. 822	*R.*	176
Nisbett *v.* William Dixon & Co.	14 D. 973	*R.*	637
Nolan *v.* Dental Manufacturing Co. Ltd.	[1958] 1 W.L.R. 936; [1958] 2 All E.R. 449		747
Nona *v.* Arnolis	17 N.L.R. 425	*R.*	570
Norris *v.* Syndic Manufacturing Co.	[1952] 2 Q.B. 135; [1952] 1 T.L.R. 858; [1952] 1 All E.R. 935		752
North Staffordshire Railway Co. *v.* Edge	[1920] A.C. 254; 36 T.L.R. 115	*C.*	54, 70
North Staffordshire Railway Co. *v.* Edge	[1920] A.C. 254; 36 T.L.R. 115		582
Northern Motors *v.* York Rating Authority	20 R. & I.T. 6		220
Ogden, *In re*	[1933] Ch. 678; 49 T.L.R. 341	*R.*	478
Oppenheim *v.* Tobacco Securities Trust Co. Ltd.	[1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31	*Appl.*	440, 455
Oppenheim *v.* Tobacco Securities Trust Co. Ltd.	[1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31	*R.*	315, 322, 824
Ormond Investment Co. Ltd. *v.* Betts	[1928] A.C. 143		279
O'Rourke *v.* Darbishire	[1920] A.C. 581		800
Ovington *v.* M'Vicar	2 M. 1066	*R.*	637, 638, 641, 650
Paine *v.* Colne Valley Electricity Supply Co. Ltd.	55 T.L.R. 181; [1938] 4 All E.R. 803		608
Paris *v.* Stepney Borough Council	[1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42		613, 746
Parker, decd., *In re*	[1949] V.L.R. 133		448
Parr, decd., *In re*	30 N.S.W.S.R. 10		279
Paterson Steamships Ltd. *v.* Canadian Co-operative Wheat Producers Ltd.	[1934] A.C. 538; 51 T.L.R. 5		595, 608

Paterson Steamships Ltd. *v.* Robin Hood Mills Ltd. The Thordoe	58 Ll.L.Rep. 33	*Appl.*	590, 602
Paterson *v.* Wallace & Co.	1 Macq.H.L. 748	*R.*	639
Pearson *v.* Lambeth Borough Council	[1950] 2 K.B. 353; 66 T.L.R. (Pt. 1) 561; [1950] 1 All E.R. 682	*R.*	69
Pender *v.* Lushington	6 Ch.D. 70		769
Penny *v.* National Coal Board	Unrep., Jan. 27, 1955 (Newcastle-upon-Tyne Assizes)	*R.*	709
Penny *v.* Wimbledon Urban District Council	[1899] 2 Q.B. 72; 15 T.L.R. 348		613
Penny and South Eastern Railway Co., *In re*	7 E. & B. 660		675
Perkowski *v.* Wellington Corporation	[1957] N.Z.L.R. 39	*Aff.*	54
Perpetual Trustee Co. (Ltd.) *v.* Ferguson	51 N.S.W.S.R. 256		451
Perpetual Trustee Co. (Ltd.) *v.* King George's Fund for Sailors	50 N.S.W.S.R. 145		465
Perpetual Trustee Co. (Ltd.) *v.* Wittscheibe	40 N.S.W.S.R. 501		470
Perth Corporation *v.* Watson	18 W.A.L.R. 8		58
Petrofina S.A. of Brussels *v.* Compagnia Italiana Trasporto Olii Minerali of Genoa	53 T.L.R. 650	*C.*	135, 158, 167, 177, 186
Pfister *v.* Toronto Transportation Commission	[1946] 3 D.L.R. 71		63
Philip *v.* Wettasinghe	38 N.L.R. 261		567
Pichon, *In re*	47 N.S.W.S.R. 186	*R.*	284, 289
Pig Marketing Board (Northern Ireland) *v.* Inland Revenue Commissioners	[1945] N.I. 155; 26 T.C. 319		545
Plank *v.* Stirling Magistrates	1956 S.C. 92	*R.*	68
Porteous, *In re*	[1949] V.L.R. 383		277
Potteries Electric Traction Co. Ltd. *v.* Bailey	[1931] 1 K.B. 385; 46 T.L.R. 601; [1931] A.C. 151; 47 T.L.R. 154	*Appl.*	214, 227, 228, 232, 235–237, 239, 244, 246
Powell *v.* Streatham Manor Nursing Home	[1935] A.C. 243; 51 T.L.R. 289		795
Prevost, *In re*	[1930] 2 Ch. 383; 46 T.L.R. 557	*R.*	481
Price, *In re*	[1943] Ch. 422; 59 T.L.R. 367; [1943] 2 All E.R. 505	*C.*	459, 480, 482, 485
Price, *In re*	35 N.S.W.S.R. 444		465
Priestley *v.* Fowler	3 M. & W. 1	*R.*	618
Purkis *v.* Walthamstow Borough Council	151 L.T. 30	*R.*	69
Pyrene Co. Ltd. *v.* Scindia Navigation Co. Ltd.	[1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158		150
Qualcast (Wolverhampton) Ltd. *v.* Haynes	[1958] 1 W.L.R. 225; [1958] 1 All E.R. 441	*Rev.*	744
Queen's Case, The	2 B. & B. 284	*R.*	106
Rayfield *v.* Hands	[1958] 2 W.L.R. 851; [1958] 2 All E.R. 194		768
Ray's Will Trusts, *In re*	[1936] Ch. 520; 52 T.L.R. 446	*C.*	459, 481

Read *v.* J. Lyons & Co. Ltd.	[1947] A.C. 156; 62 T.L.R. 646; [1946] 2 All E.R. 271		615
Reed (A. E.) & Co. Ltd. *v.* Page, Son and East Ltd.	[1927] 1 K.B. 743; 43 T.L.R. 272		598
Reg. *v.* Algar	[1954] 1 Q.B. 279; [1953] 3 W.L.R. 1007; [1953] 2 All E.R. 138	*R.*	112
Reg. *v.* Board of Control, *Ex p.* Rutty	[1956] 2 Q.B. 109; [1956] 2 W.L.R. 822; [1956] 1 All E.R. 769	*R.*	107
Reg. *v.* Bolton	1 Q.B. 66	*R.*	695
Reg. *v.* Bourdon	2 C. & K. 366	*R.*	106
Reg. *v.* Commissioners for Special Purposes of the Income Tax	21 Q.B.D. 313; 4 T.L.R. 636		669
Reg. *v.* De Rutzen	1 Q.B.D. 55	*R.*	695
Reg. *v.* Fulham, Hammersmith and Kensington Rent Tribunal, *Ex p.* Hierowski	[1953] 2 Q.B. 147; [1953] 2 W.L.R. 1028; [1953] 2 All E.R. 4	*R.*	694
Reg. *v.* Governor of Brixton Prison, *Ex p.* De Demko	[1959] 1 Q.B. 268; [1958] 3 W.L.R. 624; [1958] 3 All E.R. 360	*Aff.*	655
Reg. *v.* Head	[1958] 1 Q.B. 132; [1958] 2 W.L.R. 617; [1958] 1 All E.R. 679	*R.*	690, 694
Reg. *v.* Liverpool Justices	[1959] 1 W.L.R. 149; [1959] 1 All E.R. 337	*R.*	694
Reg. *v.* Manchester and Leeds Railway Co.	8 A. & E. 413	*R.*	695
Reg. *v.* Manchester Legal Aid Committee	[1952] 2 Q.B. 413; [1952] 1 T.L.R. 476; [1952] 1 All E.R. 480	*R.*	696
Reg. *v.* Medical Appeal Tribunal, *Ex p.* Gilmore	[1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; [1957] 1 All E.R. 796	*C.*	664, 690, 694
Reg. *v.* Medical Appeal Tribunal, *Ex p.* Gilmore	[1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; [1957] 1 All E.R. 796	*R.*	110, 112
Reg. *v.* Patents Appeal Tribunal, *Ex p.* Baldwin & Francis Ltd.	[1957] R.P.C. 465; [1959] 1 Q.B. 105; [1958] 2 W.L.R. 1010; [1958] 2 All E.R. 368	*Aff.*	664
Reg. *v.* Patents Appeal Tribunal, *Ex p.* Champion Paper and Fibre Co.	[1957] 1 W.L.R. 248; [1957] 1 All E.R. 227		667
Reg. *v.* Surrey Justices	L.R. 5 Q.B. 466	*R.*	696
Reg. *v.* Whitmarsh	15 Q.B. 600	*C.*	294, 320
Regis Property Co. Ltd. *v.* Dudley	[1958] 1 Q.B. 346; [1958] 2 W.L.R. 356; [1958] 1 All E.R. 510	*Aff.*	371
Reilly *v.* British Transport Commission	[1957] 1 W.L.R. 76; [1956] 3 All E.R. 857	*Appr.*	257, 265, 268

Renton (G. H.) & Co. Ltd. *v.* Palmyra Trading Corporation of Panama. The Caspiana	[1957] A.C. 149; [1957] 2 W.L.R. 45; [1956] 3 All E.R. 957	*C.*	135, 175, 181
Renton (G. H.) & Co. Ltd. *v.* Palmyra Trading Corporation of Panama	[1956] 1 Q.B. 462; [1956] 2 W.L.R. 232; [1956] 1 All E.R. 209; [1957] A.C. 149; [1957] 2 W.L.R. 45; [1956] 3 All E.R. 957	*Appl.*	577, 587
Reohorn *v.* Barry Corporation	[1956] 1 W.L.R. 845; [1956] 2 All E.R. 742		23
Revell *v.* Edinburgh Life Insurance Co.	5 T.C. 221		416
Rex *v.* Alverston	Holt 507	*R.*	689
Rex *v.* Bass	5 T.R. 251	*R.*	695
Rex *v.* Board of Education	[1909] 2 K.B. 1045; 25 T.L.R. 795; [1910] 2 K.B. 165; 26 T.L.R. 422; [1911] A.C. 179; 27 T.L.R. 378 (sub nom. Board of Education *v.* Rice)	*R.*	694
Rex *v.* Board of Education	[1910] 2 K.B. 165; 26 T.L.R. 422		674
Rex *v.* Bourn (Inhabitants)	Burr.S.C. 39	*R.*	689, 690
Rex *v.* Cambridgeshire Justices	4 A. & E. 111	*R.*	696
Rex *v.* Cashiobury Justices	3 D. & R. 35	*R.*	689
Rex *v.* Cheshire Justices, *Ex p.* Heaver	108 L.T. 374; 29 T.L.R. 23		673
Rex *v.* Cook	[1954] 1 W.L.R. 125; [1954] 1 All E.R. 60		89
Rex *v.* Governor of Brixton Prison, *Ex p.* Savarkar	[1910] 2 K.B. 1056; 26 T.L.R. 561	*Appr.*	655, 661, 662
Rex *v.* Harman	2 Sess.Cas.K.B. 201	*R.*	696
Rex *v.* Liston	5 T.R. 251	*R.*	689
Rex *v.* London County Council	[1915] 2 K.B. 466; 31 T.L.R. 329	*R.*	694
Rex *v.* Mayor, etc., of London	4 T.R. 21		252
Rex *v.* Minister of Health	[1939] 1 K.B. 232; 55 T.L.R. 4; [1938] 4 All E.R. 32		674
Rex *v.* Nat Bell Liquors Ltd.	[1922] 2 A.C. 128; 38 T.L.R. 541	*R.*	112
Rex *v.* Nat Bell Liquors Ltd.	[1922] 2 A.C. 128; 38 T.L.R. 541	*R.*	678, 687
Rex *v.* Northumberland Compensation Appeal Tribunal	[1951] 1 K.B. 711; [1951] 1 T.L.R. 270; [1951] 1 All E.R. 238; [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 2 All E.R. 128	*R.*	687, 689, 690, 694, 695
Rex *v.* Pontypridd County Court Registrar	64 T.L.R. 73; [1948] 1 All E.R. 218	*R.*	694
Rex *v.* Special Commissioners of Income Tax, *Ex p.* Shaftesbury Homes and Arethusa Training Ship	[1922] 2 K.B. 729; 38 T.L.R. 860; [1923] 1 K.B. 393; 39 T.L.R. 99		303

Rex *v.* Upton Gray (Inhabitants)	Caldecott 308	*R.*	689, 693
Rex *v.* Uttoxeter (Inhabitants)	Cunn. 28; 1 Sess. Cas.K.B. 163	*R.*	689
Rex *v.* Warnford	5 D. & R. 489		668
Richardson *v.* London County Council	[1957] 1 W.L.R. 751; [1957] 2 All E.R. 330		92
Riden *v.* A. C. Billings & Sons Ltd.	[1957] 1 Q.B. 46; [1956] 3 All E.R. 357; [1958] A.C. 240; [1957] 3 All E.R. 1		57
Riverstone Meat Co. Pty. Ltd. *v.* Lancashire Shipping Co. Ltd.	[1959] 1 Q.B. 74; [1958] 3 W.L.R. 482; [1958] 3 All E.R. 261		608
Robert Addie & Sons (Collieries) Ltd. *v.* Dumbreck	[1929] A.C. 358; 45 T.L.R. 267		59
Robert Batcheller & Sons Ltd. *v.* Batcheller	[1945] Ch. 169; 61 T.L.R. 233; [1945] 1 All E.R. 522		465
Roberts *v.* Dorman Long & Co. Ltd.	[1953] 1 W.L.R. 942; [1953] 2 All E.R. 428	*R.*	762
Robinson Brothers (Brewers) Ltd. *v.* Durham Assessment Committee	[1938] A.C. 321; 54 T.L.R. 568; [1938] 2 All E.R. 79		818
Rodney, The	[1900] P. 112		596
Rodocanachi, Sons & Co. *v.* Milburn Brothers	18 Q.B.D. 67; 3 T.L.R. 115		76
Roman Catholic Archbishop of Melbourne *v.* Lawlor	51 C.L.R. 1		465
Royal College of Nursing *v.* St. Marylebone Borough Council	[1958] 1 W.L.R. 95; [1958] 1 All E.R. 129		542
Royal College of Surgeons of England *v.* National Provincial Bank Ltd.	[1951] Ch. 70; 66 T.L.R. (Pt. 2) 519; [1950] 2 All E.R. 466; [1951] Ch. 485; [1951] 1 T.L.R. 629; [1951] 1 All E.R. 494; [1952] A.C. 631; [1952] 1 T. L.R. 978; [1952] 1 All E.R. 984	*R.*	555, 557, 561
Royal College of Surgeons of England *v.* National Provincial Bank Ltd.	[1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984	*R.*	320
Royal Crown Derby Porcelain Co. Ltd. *v.* Russell	[1949] 2 K.B. 417; [1949] 1 All E.R. 749	*Appl.*	273, 292
Russell *v.* Pusey	Unrep., Dec. 23, 1924 (Sup.Ct. of Jamaica)		729
Russell (Inspector of Taxes) *v.* Scott	[1948] A.C. 422; 64 T.L.R. 297; [1948] 2 All E.R. 1		120
Ryslip Parish *v.* Hendon Parish	Holt 572	*R.*	688
St. Clement's Parish *v.* St. Andrew's Parish, Holborn	6 Mod. 287; 2 Salk. 606	*R.*	696
St. John's College Trust Board *v.* Auckland Education Board	[1945] N.Z.L.R. 507	*O.*	2, 17, 19

Salte *v.* Thomas	3 B. & P. 188	*R.*	106
Scales *v.* Lawrence	2 F. & F. 289		381
Scammell (G.) & Nephew Ltd. *v.* Ouston	[1941] A.C. 251; 57 T.L.R. 280; [1941] 1 All E.R. 14	*R.*	175
Scottish Motor Traction Co. Ltd. *v.* Edinburgh Assessor	1931 S.C. 416	*Appl.*	214, 227–229, 237–239, 246
Seereelall Jhuggroo *v.* Central Arbitration and Control Board	[1953] A.C. 151	*R.*	695
Sergeson *v.* Sealey	2 Atk. 412	*R.*	107
Serraino & Sons *v.* Campbell	[1891] 1 Q.B. 283; 7 T.L.R. 174	*R.*	179
Sew *v.* Koreeshee	L.R. 27 I.A. 98		524
Shepheard *v.* Broome	[1904] A.C. 342; 20 T.L.R. 540		801
Shepherd's Trustees *v.* Shepherd	1950 S.C.(H.L.) 60; [1949] 2 All E.R. 1044		769
Shillinglaw *v.* J. G. & R. Turner	1925 S.C. 807		63
Shipwrecked Fishermen and Mariners' Royal Benevolent Society, *In re*	[1959] Ch. 220; [1958] 3 W.L.R. 701; [1958] 3 All E.R. 465		545
Shore *v.* Wilson	9 Cl. & F. 355		666
Shuttleworth, *In re*	9 Q.B. 651	*R.*	113
Simmons *v.* Huntingdon Corporation	[1936] 1 All E.R. 596		60
Simpson *v.* Teignmouth and Shaldon Bridge Co.	[1903] 1 K.B. 405; 19 T.L.R. 225	*C.*	188, 195, 196
Skegness U. D. C. *v.* Derbyshire Miners' Welfare Committee	[1958] 1 Q.B. 298; [1957] 3 W.L.R. 1048; [1957] 3 All E.R. 692	*Aff.*	808
Skibsaktieselskapet Thor Thoresens Linje *v.* H. Tyrer & Co. Ltd.	35 Ll.L.Rep. 163		583
Slade *v.* Battersea and Putney Hospital Management Committee	[1955] 1 W.L.R. 207; [1955] 1 All E.R. 429		58
Slater *v.* Clay Cross Co. Ltd.	[1956] 2 Q.B. 264; [1956] 2 All E.R. 625	*Dist.*	54, 67
Smackman *v.* General Steam Navigation Co.	13 Com.Cas. 196	*R.*	589
Smeaton Hanscomb & Co. Ltd. *v.* Sassoon I. Setty, Son & Co. (No. 1)	[1953] 1 W.L.R. 1468; [1953] 2 All E.R. 1471		581
Smith, *In re*	[1914] 1 Ch. 937; 30 T.L.R. 411	*R.*	479
Smith (Catherine), *In re*	[1937] N.Z.L.R. 33		466
Smith *v.* Austin Lifts Ltd.	[1959] 1 W.L.R. 100; [1959] 1 All E.R. 81		747
Smith *v.* Charles Baker & Sons	[1891] A.C. 325; 7 T.L.R. 679	*Appl.*	605, 619, 620, 628
Smith *v.* Charles Baker & Sons	[1891] A.C. 325; 7 T.L.R. 679		751
Smith *v.* East Elloe Rural District Council	[1956] A.C. 736; [1956] 2 W.L.R. 888; [1956] 1 All E.R. 855	*R.*	109
Smith *v.* New Forest Union Assessment Committee	61 L.T. 870		254
Smith *v.* Wilson	9 S.L.T. 137	*R.*	775, 780, 786, 787
Smith *v.* Young	1 Camp. 439		580

Smith, Hogg & Co. Ltd. *v.* Black Sea and Baltic General Insurance Co. Ltd.	[1940] A.C. 997; 56 T.L.R. 893; [1940] 3 All E.R. 405		595
Smithwick *v.* National Coal Board	[1950] 2 K.B. 335; 66 T.L.R. (Pt. 2) 173		260
South Australian Co. *v.* Richardson	20 C.L.R. 181		58
Spencer *v.* Commonwealth of Australia	5 C.L.R. 418		9
Spurling (J.) Ltd. *v.* Bradshaw	[1956] 1 W.L.R. 461; [1956] 2 All E.R. 121		581
Srimati Bibhabati Devi *v.* Kumar Ramendra Narayan Roy	[1946] A.C. 508; 62 T.L.R. 549		793
Stafford Allen & Sons Ltd. *v.* Pacific Steam Navigation Co.	[1956] 1 W.L.R. 629; [1956] 2 All E.R. 716		142
Stag Line Ltd. *v.* Foscolo Mango & Co. Ltd.	[1932] A.C. 328; 48 T.L.R. 127	*C.*	590, 603
Stag Line Ltd. *v.* Foscolo Mango & Co. Ltd.	[1932] A.C. 328; 48 T.L.R. 127		812
Stag Line Ltd. *v.* Foscolo Mango & Co. Ltd.	[1931] 2 K.B. 48; 47 T.L.R. 278; [1932] A.C. 328; 48 T.L.R. 127	*R.*	321
Stainer's Executors *v.* Purchase (Inspector of Taxes)	[1952] A.C. 280; [1951] 2 T.L.R. 1112; [1951] 2 All E.R. 1071; 32 T.C. 367	*Appl.*	413, 422–428, 430, 431, 433–435, 438
Standen *v.* Chrismas	10 Q.B. 135	*R.*	407
Stepney Borough Council *v.* Joffe	[1949] 1 K.B. 599; 65 T.L.R. 176; [1949] 1 All E.R. 256		386
Stettin, The	14 P.D. 142, 147; 5 T.L.R. 581		583
Stevenson *v.* Corporation of Glasgow	1908 S.C. 1034		63
Stevenson *v.* Wilson	1907 S.C. 445	*R.*	780, 781, 787
Stirland *v.* Director of Public Prosecutions	[1944] A.C. 315; 60 T.L.R. 461; [1944] 2 All E.R. 13		92
Stockloser *v.* Johnson	[1954] 1 Q.B. 476; [1954] 1 All E.R. 630		76
Street *v.* British Electricity Authority	[1952] 2 Q.B. 399; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679	*R.*	241
Strother *v.* Barr	5 Bing. 136	*R.*	106
Sumner *v.* R. L. Priestley Ltd.	[1955] 1 W.L.R. 1202; [1955] 3 All E.R. 445		261
Swan, Hunter and Wigham Richardson Ltd. *v.* France Fenwick Tyre and Wear Co. Ltd.	[1953] 1 W.L.R. 1026; [1953] 2 All E.R. 679	*R.*	589
Tacon, *In re*	[1958] Ch. 447; [1958] 2 W.L.R. 66; [1958] 1 All E.R. 163		447
Tasmania (Owners) and Owners of Freight *v.* Smith. The Tasmania	15 App.Cas. 223	*R.*	69
Tasmania, The	15 App.Cas. 223		191
Tasmania, The	15 App.Cas. 223		582
Taylor, *In re*	[1940] Ch. 481; 56 T.L.R. 588	*R.*	480

Taylor *v.* Sims & Sims	167 L.T. 414; 58 T.L.R. 339; [1942] 2 All E.R. 375		615
Taylor *v.* Taylor	10 C.L.R. 218		452
Taylor *v.* Webb	[1937] 2 K.B. 283; 53 T.L.R. 377; [1937] 1 All E.R. 590	*Q.*	371, 392–394, 397, 398, 402, 410
Terrell *v.* Murray	17 T.L.R. 570		378
Thomas *v.* British Thomson-Houston Co. Ltd.	[1953] 1 W.L.R. 67; [1953] 1 All E.R. 29	*R.*	241
Thomas *v.* Thomas	2 Q.B. 851		75
Thomas *v.* Valuer-General	37 N.Z.L.R. 164		7
Thomas Fattorini (Lancashire) Ltd. *v.* Inland Revenue Commissioners	[1940] 3 All E.R. 657; 24 T.C. 328; [1942] A.C. 643; [1942] 1 All E.R. 619	*C.*	488, 503, 504, 508
Thomas (T. W.) & Co. Ltd. *v.* Portsea Steamship Co. Ltd.	[1912] A.C. 1	*R.*	155, 178, 179
Thomas (or Watt) *v.* Thomas	1947 S.C.(H.L.) 45; [1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582		333
Thompson, *In re*	[1934] Ch. 342	*R.*	484
Thompson *v.* Bankstown Corporation	87 C.L.R. 619		58
Thomson *v.* Cremin	[1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185	*Dist.*	605, 642, 643, 647, 648, 651
Thurogood *v.* Van Den Berghs & Jurgens Ltd.	[1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682	*R.*	241, 245
Tidy *v.* Battman	[1934] 1 K.B. 319	*R.*	761
Toogood & Sons Ltd. *v.* Green	[1932] A.C. 663; 48 T.L.R. 463		223
Toronto Power Co. Ltd. *v.* Paskwan	[1915] A.C. 734		607
Townley Mill Co. (1919) Ltd. *v.* Oldham Assessment Committee	[1937] A.C. 419; 53 T.L.R. 205; [1937] 1 All E.R. 11		254
Townsend *v.* Electrical Yarns Ltd.	[1952] 1 T.L.R. 728; [1952] 1 All E.R. 918		496
Town Tailors Ltd. *v.* Peacock's Stores Ltd.	167 Estates Gazette 292		24
Tree, *In re*	[1945] Ch. 325; 61 T.L.R. 383; [1945] 2 All E.R. 65	*Dist.*	440, 456
Tudor Accumulator Co. Ltd. *v.* Oceanic Steam Navigation Co. Ltd.	41 T.L.R. 81; 20 Ll.L.Rep. 106		143
Turner *v.* Minister of Public Instruction	95 C.L.R. 245	*C.*	2, 17–19
Turpin *v.* Middlesbrough Assessment Committee	[1931] A.C. 446; 47 T.L.R. 408		223
Twycross *v.* Grant	2 C.P.D. 469		798
Udalagama *v.* Boange	57 N.L.R. 385	*Rev.*	565
Underwood (A. L.) Ltd. *v.* Bank of Liverpool	[1924] 1 K.B. 775; 40 T.L.R. 302		748
United Africa Co. Ltd. *v.* Saka Owoade	[1955] A.C. 130; [1955] 2 W.L.R. 13; [1957] 3 All E.R. 216	*R.*	588

United Grand Lodge of Ancient, Free and Accepted Masons of England *v.* Holborn Borough Council	[1957] 1 W.L.R. 1080; [1957] 3 All E.R. 281		306
United Zinc and Chemical Co. *v.* Britt	258 U.S. 268	*R.*	67
Union Trustee Co. of Australia Ltd. *v.* Church of England Property Trust, Diocese of Sydney	46 N.S.W.S.R. 298		465
Upsons Ltd. *v.* E. Robins Ltd.	[1956] 1 Q.B. 131; [1955] 3 All E.R. 348		25
Van Grutten *v.* Foxwell	[1897] A.C. 658	*R.*	107
Verge *v.* Somerville	[1924] A.C. 496; 40 T.L.R. 279	*Appl.*	440, 454
Vincent *v.* Southern Railway Co.	[1927] A.C. 430		260
Vyricherla Narayana Gajapatiraju *v.* Revenue Divisional Officer, Vizagapatam	[1939] A.C. 302; 55 T.L.R. 563	*R.*	14
Waddle *v.* Wallsend Shipping Co. Ltd.	[1952] 2 Lloyd's Rep. 105		608
Walsall Overseers *v.* London and North Western Railway Co.	4 App.Cas. 30	*R.*	688
Walsh *v.* National Coal Board	[1956] 1 Q.B. 511; [1955] 3 W.L.R. 829; [1955] 3 All E.R. 632		701
Warren *v.* Keen	[1954] 1 Q.B. 15; [1953] 3 W.L.R. 702; [1953] 2 All E.R. 1118	*R.*	407, 410
Warringah Shire Council *v.* Salvation Army (N.S.W.) Property Trust	15 L.G.R. (N.S.W.) 91		250
Watson's (Leonard) Case	9 A. & E. 731	*R.*	107
Watt (or Thomas) *v.* Thomas	[1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582	*R.*	806
Webb *v.* Smith, Bingley & Evans Ltd.	(1956) Unrep., Dec. 18 (Stable J. at Birmingham Assizes)	*R.*	760
Weems *v.* Mathieson	4 Macq.H.L. 215	*R.*	637, 638, 640, 650
Westminster Council *v.* Southern Railway Co.	[1936] A.C. 511; 52 T.L.R. 541; [1936] 2 All E.R. 322		251
Wheare, *In re*	[1950] S.A.S.R. 61	*R.*	289
White, *In re*	[1893] 2 Ch. 41; 9 T.L.R. 32		467
White, *In re*	[1893] 2 Ch. 41; 9 T.L.R. 261		449
Whitney *v.* Inland Revenue Commissioners	[1926] A.C. 37; 42 T.L.R. 58		491
Williams *v.* Lord Bagot	4 D. & R. 315		668
Williams *v.* Morgan	[1906] 1 Ch. 804	*Dist.*	519, 529
Williams Brothers *v.* Ed. T. Agius Ltd.	[1914] A.C. 510	*C.*	72, 82
Williams' Trustees *v.* Inland Revenue Commissioners	[1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513		445, 811
Williams' Trustees *v.* Inland Revenue Commissioners	[1945] 2 All E.R. 235; 173 L.T. 221		445
Wilson *v.* Clapham	1 Jac. & W. 36		130
Wilson *v.* Merry and Cunningham	5 M. 807; L.R. 1 Sc. & D. 326	*R.*	638, 639, 650, 653

Wilson *v.* Tyneside Window Cleaning Co.	[1958] 2 Q.B. 110; [1958] 2 W.L.R. 900; [1958] 2 All E.R. 265		615, 747
Wilsons & Clyde Coal Co. Ltd. *v.* English	[1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628; 1936 S.C. 883; 1937 S.C. (H.L.) 46	*E.*	605, 619, 621–624, 630–634, 641, 642, 644, 646–649, 651, 653
Wilsons and Clyde Coal Co. Ltd. *v.* English	[1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628	*R.*	757
Winstanley *v.* North Manchester Overseers	[1910] A.C. 7		252
Winter *v.* Cardiff Rural District Council	[1950] 1 All E.R. 819; 114 J.P. 234		613, 747
Wolffe, *In re*	[1953] 1 W.L.R. 1211; [1953] 2 All E.R. 697		447
Wood *v.* London County Council	[1941] 2 K.B. 232; 57 T.L.R. 499; [1941] 2 All E.R. 1		244
Wood (R. T.) & Co. *v.* A. & A. Y. Mackay	8 F. 625	*R.*	640
Woodhall, *Ex p.*	20 Q.B.D. 832; 4 T.L.R. 515	*R.*	662
Woods *v.* Durable Suites Ltd.	[1953] 1 W.L.R. 857; [1953] 2 All E.R. 391	*R.*	758, 761
Woolmer *v.* Delmer Price Ltd.	[1955] 1 Q.B. 291; [1955] 2 W.L.R. 329; [1955] 1 All E.R. 377		583
Working Men's Club and Institute Ltd. *v.* Swansea Corporation	[1958] 1 W.L.R. 1135; [1958] 1 All E.R. 414		544
Wragg Ltd., *In re*	[1897] 1 Ch. 796; 13 T.L.R. 302		802
Wright, *In re*, Blizard *v.* Lockhart	[1954] Ch. 347; [1954] 2 W.L.R. 972; [1954] 2 All E.R. 98		452
X.L. Fisheries Ltd. *v.* Leeds Corporation	[1955] 2 Q.B. 636; [1955] 2 All E.R. 875		22
Yenidje Tobacco Co. Ltd., *In re*	[1916] 2 Ch. 426; 32 T.L.R. 709	*R.*	368
Young *v.* National Coal Board	Unrep., July 5, 1956 (Court of Session)		701
Yuill *v.* Yuill	[1945] P. 15; 61 T.L.R. 176; [1945] 1 All E.R. 183	*R.*	806

STATUTES JUDICIALLY CONSIDERED

1881

Fugitive Offenders Act, 1881 (44 *&* 45 *Vict.* c. 69), *ss.* 10, 39 - **H.L.(E.) 654**

1900

Railway Employment (Prevention of Accidents) Act, 1900 (63 *&* 64 *Vict. c.* 27), *s.* 1 - - - - **H.L.(E.) 256**

1911

Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 49 - - - - **H.L.(E.) 698**

1913

Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *ss.* 1, 9, 56 (1) (*a*) **H.L.(E.) 83**

1918

Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I* - - **H.L.(E.) 199**

—— —— *Sch. D, Cases II, III, VI* **H.L.(E.) 412**

1924

Carriage of Goods by Sea Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., arts. II, III, rr.* 1, 8, *IV, rr.* 1, 2, *V* **H.L.(E.) 133**

—— —— *Sch., arts. III, r.* 1, *IV, r.* 2 (*b*) **J.C. 589**

1925

Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31 **H.L.(E.) 654**

—— —— *s.* 98 - - - **H.L.(E.) 663**

1928

Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3 **H.L.(E.) 213**

1943

War Damage Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *ss.* 36, 66, 79, 80 - **H.L.(E.) 199**

1948

Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 210 - - - **H.L.(Sc.) 324**

1949

War Damage (Public Utility Undertakings, etc.) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 36), *s.* 28 (1) (4) - **H.L.(E.) 199**

Patents Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 87), *ss.* 9, 85 (1) - - **H.L.(E.) 663**

1952

Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 245, 255 (3), 292, 323 - - - - **H.L.(E.) 487**

—— —— *Sch. D, Cases II, III, VI* **H.L.(E.) 412**

1954

Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 26 (6), 30 (1) (*f*) (*g*), 31 (1) **H.L.(E.) 20**

1955

Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 - - - - **H.L.(E.) 293**
H.L.(E.) 540
H.L.(E.) 807

1957

Nurses Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 15) **H.L.(E.) 540**

Rent Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *ss.* 1, 2, *Sch. I, para.* 1 (1) (2) (3) **H.L.(E.) 370**

AUSTRALIA

1916

Testator's Family Maintenance and Guardianship of Infants Act, 1916–1954 (*N.S.W.*), *s.* 3 (1) - - **J.C. 272**

1919

Conveyancing Act, 1919–1954 (*N.S.W.*), *s.* 37*D* **J.C. 457**

Local Government Act, 1919 (*N.S.W.*), *s.* 132 (1) (*d*) - - - - **J.C. 248**

CANADA

1936

Canadian Water Carriage of Goods Act, 1936 **J.C. 589**

CEYLON

Marriages (General) Ordinance (Legislative Enactments of Ceylon, 1938, *c.* 95), *s.* 19 (3), *proviso* - - **J.C. 565**

EAST AFRICA

1952

East African Income Tax (Management) Act, 1952, *ss.* 59 (1), 71 (1), 72 - **J.C. 114**

FIJI

Fiji Criminal Procedure Ordinance, *c.* 9, *s.* 246 **J.C. 533**

INDIA

1882

Indian Transfer of Property Act, 1882 (*Act IV of* 1882), *s.* 55 (1) (*e*) - **J.C. 124**

Indian Transfer of Property Act, 1882 (*Act XIV of* 1882), *s.* 67 - - **J.C. 518**

JAMAICA

1895

Wharfage Law, 1895 (*c.* 281, *Rev. Laws of Jamaica*, 1938; *c.* 412 *of* 1953 *Revision*), *ss.* 12, 16 (9), *Sch. A* **J.C. 187**

1938

Registration of Titles Law (*c.* 353 *of R.S. of Jamaica*, 1938), *ss.* 67, 69 - **J.C. 719**

Limitation of Actions Law (*c.* 395 *of R.S. of Jamaica*, 1938), *ss.* 3, 46 - **J.C. 719**

NEW ZEALAND

1919

Acquisition of Land (*Assessment of Compensation*) *Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 2 - - - - **J.C. 1**

1944

Finance Act (*No.* 3), **1944**, ***s.* 29 (1) (*b*)** **J.C. 1**

1947

Control of Prices Act, **1947, *No.* 51, *s.* 2 (1)** **J.C. 71**

UNITED STATES OF AMERICA

Carriage of Goods by Sea Act, 1936 (*Public, No.* 521, 74*th Congress*), *ss.* 2, 3 (1), 4 (1) (2), 5, 13 - - **H.L.(E.) 133**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Prevention of Accidents Rules, 1902 (*S.R. & O.*, 1902, *No.* 616), *r.* 9 **H.L.(E.) 256**

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL

MAORI TRUSTEE . . . . . . APPELLANT;

AND

MINISTRY OF WORKS . . . . . RESPONDENT.

J. C.*

1958
Oct. 2.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Compulsory Purchase — Compensation — Potentiality for building development—Principles applicable—Maori land—(New Zealand) Finance Act (No. 3), 1944, *s.* 29 (1) (*b*)—*Acquisition of Land (Assessment of Compensation) Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 2.
New Zealand.

On September 15, 1952 (the specified date) the Crown, under the Public Works Act, 1928, of New Zealand, compulsorily acquired 91 acres of Maori land, part of an area of 242 acres in respect of which there was at the date of taking no more than a paper plan of a proposed subdivision into lots, and if the approval of the plan had been received from the appropriate Minister and the subdivision had in fact been carried out by the provision of roads, drainage and other facilities, some of the lots could have been sold immediately for residential or industrial purposes and the balance sold in lots from time to time over a period of years. On the specified date, however, there were in fact no subdivided lots, no roads or drainage, etc.—the land had still to be developed for subsequent occupation as building land:—

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD DENNING.

Held, that the Maori Land Court, in assessing compensation for the land taken, must value it in its state at the time of taking, and under section 29 (1) (*b*) of the Finance Act (No. 3), 1944, of New Zealand, that value was to be assessed at "the amount which the "land if sold in the open market by a willing seller on the specified "date might be expected to realize." The land must be valued for what it in fact was on the specified date—a tract of land capable of subdivision into building allotments and being sold subsequently in that form, but there must be excluded from the court's contemplation retention by the claimant, and an assessment of what in his hands it would yield if subdivided. To give a claimant compensation on the basis that there were subdivisions of the land, when, in fact, there were not, would be to give him compensation for unrealized possibilities as if they were realized possibilities.

St. John's College Trust Board v. *Auckland Education Board* [1945] N.Z.L.R. 507 overruled.

Turner v. *Minister of Public Instruction* (1956) 95 C.L.R. 245 considered.

The court must contemplate the sale of the land as a whole unless it appeared that the necessary legal consents to a subdivisional plan had been given, and a survey on the ground at the specified date would have disclosed that the land or some part of it was in fact so far subdivided that the subdivided parts could at that date have been immediately sold and title given to individual purchasers, in which case the parts so subdivided might be separately valued for the purpose of arriving at the total amount of compensation.

If the land had to be valued as a whole, the court, in assessing the potentialities, might take into account the suitability of the land for subdivision, the prospective yield from a subdivision, the costs of effecting such a subdivision, and the likelihood that a purchaser acquiring the land with that object would allow some margin for unforeseen costs, contingencies and profit for himself.

Order of the Court of Appeal of New Zealand varied.

APPEAL (No. 12 of 1958) from an order of the Court of Appeal of New Zealand (December 19, 1956).

The following facts are taken from the judgment of the Judicial Committee: This was an appeal from the judgment of the Court of Appeal of New Zealand on a case stated by the Maori Land Court relating to the basis of compensation to be awarded in respect of land taken compulsorily by the Crown under the Public Works Act, 1928.

It will be convenient to set out chronologically certain relevant dates and events. In 1948 a plan was prepared for the subdivision of certain Maori land of some 242 acres in extent in the neighbourhood of the harbour at Tauranga. This plan required the approval of the Minister of Maori Affairs. Any sale of plots of less than 10 acres within the area, before this consent was obtained, was illegal.

Later in 1948 an application was made to the Maori Land Court for an order vesting the 242 acres in a trustee. The object was to facilitate transfers of land within the area by avoiding the need for a multiplicity of signatures. By order dated July 15, 1948, the Maori Land Court vested the land in the Waiariki District Maori Land Board (hereafter referred to as the Maori Land Board) as trustee. This order did not become operative until approved by the Minister of Maori Affairs.

On September 13, 1951, the Minister of Works gave notice of intention to take about 91 acres of the 242 acres. In November, 1951, the Minister of Maori Affairs notified his approval of the order vesting the 242 acres in the Maori Land Board. On September 11, 1952, there was gazetted a Proclamation taking the 91 acres and vesting that area in the Crown as from September 15, 1952 (hereafter called the specified date).

On September 29, 1952, the Maori Land Board claimed as compensation for the taking of the 91 acres the sum of £109,011, of which £95,711 was for the value of the land and the balance for injurious affection of other land. On September 30, 1952, under the Maori Land Amendment Act, 1952, the Maori Trustee (the present appellant) came in place of the Maori Land Board.

On April 6, 1954, an application by the Minister of Works for ascertainment of compensation for the land taken came before the Maori Land Court. On July 11, 1955, the Maori Land Court stated a case for the opinion of the Supreme Court of New Zealand which of consent was removed into the Court of Appeal who, on December 19, 1956, gave the judgment which now came before their Lordships' Board.

The relevant provision which governed the assessment of compensation was section 29 (1) (*b*) of the Finance Act (No. 3), 1944, which was in the following terms: " The value of land shall, " subject as hereinafter provided, be taken to be the amount " which the land if sold in the open market by a willing seller on " the specified date might be expected to realize."

The case stated, after pointing out that it would have been useless for the Maori Land Board to have proceeded with the subdivision after the issue of the notice of intention to take the land, continued:

" No evidence was adduced to show when the subdivision " would have been proceeded with if the Minister's approval had "been granted at an earlier date. The evidence adduced did show "that the carrying out of a subdivision would have involved a "considerable outlay for roading, drainage and other development, "and other costs of subdivision.

"Upon hearing the evidence and submissions of counsel the "court has found that part of the land would have been immediately saleable at the date of the taking in lots upon a "subdivision either for residential or industrial purposes, and that "the balance would have been saleable in lots upon a subdivision "for residential or industrial purposes from time to time over a "period of years subsequent to the date of taking.

"A question of law arises as to the basis upon which the "value of the land should be assessed, including the question as "to whether there should be any difference in the method of "assessment of the value of, first that part of the land which "would have been immediately saleable in lots at the date of the "taking, and secondly that part which would have been saleable "in lots from time to time over a period subsequent to the date "of the taking.

"The questions which are stated for the opinion of this "honourable court are:

"(1) Is the value of the land to be assessed upon the assumption that the claimant sold the land at the date of the taking "in one undivided parcel to one purchaser desirous of acquiring "it for the purpose of subdivision and sale in lots?

"(2) Is the value of the land to be assessed upon the assumption that the claimant sold at the date of the taking that part of "the land which was then immediately saleable in lots to several "purchasers in lots according to a subdivision made by him and "sold the balance of the land to several purchasers in lots from "time to time over a period subsequent to the date of the taking "according to a subdivision made by him?"

Certain further questions had been submitted on the assumption that those two questions were answered in the negative, but it was unnecessary to refer to those for the purposes of this appeal. The Court of Appeal (Gresson, Adams and Shorland JJ.) did not answer the questions stated specifically but expressed their opinion in the following order:

"(1) In accordance with section 29 (1) (*b*) of the Finance Act "(No. 3), 1944, and subject to the other provisions of that section "the function of the Maori Land Court is to ascertain as the "value of the land 'the amount which the land if sold in the "'open market by a willing seller on the specified date might be "'expected to realize.' The specified date is September 15, 1952.

"(2) The valuation must be of the land in the state in which "it is on the specified date; any potentialities shall be taken into "account in assessing its value.

"(3) The court must contemplate the sale of the land as a "whole unless on the specified date there could have been "separate sales of particular portions, and there was a market for "such separate portions. Only if the land had been legally sub-"divided at that date so that particular lots might have been sold "and title given can it be said that there could have been "separate sales of particular portions.

"(4) If the land has to be valued as a whole, the court in "assessing the potentialities may take into account the suitability "of the land for subdivision, the prospective yield from a sub-"division, the costs of effecting such a subdivision, and the "likelihood that a purchaser acquiring the land with that object "would allow some margin for unforeseen costs, contingencies "and profit for himself."

1958. July 7, 8, 9, 10. *E. D. Blundell* and *Patrick O'Connor* for the appellant. The Court of Appeal held that under the circumstances of this case the land must be treated as if it is sold in one entirety. In so doing Gresson and Shorland JJ. did not specifically overrule *St. John's College Trust Board* v. *Auckland Education Board*[1]; they tended to distinguish it. It is submitted that there is no valid point of distinction. Adams J. held that it was wrongly decided. There has also been a decision of the High Court of Australia on a similar Act—*Turner* v. *Minister of Public Instruction*[2]—where the majority of the court on the face of it supported the view taken by the Court of Appeal in the present case. Williams J. dissented. It is against that extensive conflict of judicial opinion on this question that the matter comes before this Board.

It is contended that if the method as propounded by the majority of the Court of Appeal is adopted, and even more so on the basis stated by Adams J., the beneficial owner would receive substantially less than full compensation. Such method ignores the realities of intended subdivision and the findings of the Maori Land Court that the whole of the land would have been saleable by lot, part immediately upon subdivision and the balance subsequently. Further, such method does not have sufficient regard to the probability that there would be a number of purchasers many of whom would buy lots for their own retention and use and not for resale. The requirement of lots being in fact and in law available for sale on the specified date is an erroneous interpretation of section 42 (1) of the Public Works Act, 1928, and section 29 (1) (*b*) of the Finance Act (No. 3), 1944. The right to full compensation is not to be affected merely by reason that various formalities to permit and complete the subdivision have not been completed on the specified date, and the ascertainment of the true value of the land to the owner requires this aspect to be ignored except to the extent that the costs and delay involved in completing the subdivision are proper deductions to be made.

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[1] [1945] N.Z.L.R. 507.

[2] (1956) 95 C.L.R. 245.

The correct basis for assessment of compensation requires the initial assumption that the land has been subdivided and is then to be valued on a per lot basis. From this starting point the ascertainment of the value to the beneficial owner in the circumstances of this case should proceed as follows: (a) As to that part of the land saleable in lots immediately upon subdivision, on the assumption of the aggregate of the selling value of each such lot if sold direct by the beneficial owner to a number of purchasers, many or all of whom would buy the land for their own retention and use, less a proportionate share of the costs of subdivision and any other appropriate deductions. (b) As to the balance of the land, on the assumption that it is sold to a willing purchaser who has assessed the value initially on a per lot basis and then has made reasonable deductions for the costs of subdivision of that part, the delay in sales, profit to himself on a resale in lots and any other appropriate deductions. It is submitted that in fact and in law the land was saleable in lots as at the specified date.

The Court of Appeal were wrong in requiring as a prerequisite of a sale of land the granting of all consents and the actual physical completion of the subdivision. If the approval of the Minister to the plan had been given the Trustee was then in a position to sell. It has been assumed throughout that this land was suitable for subdivision. The absence of approval to subdivision is not fatal; it is no more than a factor to be taken into account. The absence of physical subdivision is likewise not fatal. The Act which is applicable is the Finance Act (No. 3), 1944, which by section 29 (1) (*b*) provides that "the value of "land shall . . . be taken to be the amount which the land if "sold in the open market by a willing seller on the specified date "might be expected to realize." The Court of Appeal were wrong in not holding that different methods were to be applied in determining the value of that part of the land immediately saleable in lots upon subdivision and of the balance. The basic error of the Court of Appeal is their statement that "only if the land "had been legally subdivided at that date so that particular lots "might have been sold and title given can it be said that there "could have been separate sales of particular portions." That requirement goes much too far and is contrary to the realities of what goes on in many sales of subdivisions of lots.

The only legal restriction on the right to enter into a binding agreement of sale was the absence of the Minister's approval. Selling in lots is not in any way changing the condition of the land as it was when taken, and the Court of Appeal ought to have followed the *St. John's College* case.[3] It is now well established that one has to endeavour to obtain the price which the land would realize in the market with all its potentialities and advantages and subject to any restrictions and so forth if sold at the specified date by a willing seller to a willing purchaser. Basically at the root of this principle there remains always the primary object of ascertaining the value to the owner of the land. That has been the consistent approach of the courts. Restrictions which are not of an absolute nature, but of a removable nature, have not to be taken into account beyond being one of the factors in assessing the price; they are not to be regarded as being an absolute bar: see *Corrie* v. *MacDermott*[4]; Cripps on Compensation, 9th ed., p. 4035; *Thomas* v. *Valuer-General*,[5] in which the statutory provision is similar to that now under consideration; *Commonwealth of Australia* v. *Arklay*,[6] and *Minister for Public Works* v. *Thistlethwayte*.[7] Those cases show that if a restriction is not of an absolute nature, but is removable, then it is no more than a factor to be taken into account. On what constitutes a willing seller, see *Inland Revenue Commissioners* v. *Clay*.[8] So far as is permissible, section 29 (1) (*b*) should be interpreted so as to ensure full compensation to the owner. It was said in *Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam*[9] that "it is equally plain, however, "that the land must not be valued as though it had already been

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[3] [1945] N.Z.L.R. 507.

[4] [1914] A.C. 1056, 1064.

[5] (1918) 37 N.Z.L.R. 164.

[6] (1952) 87 C.L.R. 159.

[7] [1954] A.C. 475; [1954] 3 W.L.R. 305; [1954] 2 All E.R. 843.

[8] [1914] 3 K.B. 466; 30 T.L.R. 573.

[9] [1939] A.C. 302, 313; 55 T.L.R. 563.

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" built upon, a proposition that is . . . sometimes expressed by " saying that it is the possibilities of the land and not its realized " possibilities that must be taken into consideration "; but the application of that statement to the facts of the present case is not warranted.

In the *St. John's College* case[10] the question was whether there could be a sale of the land to several purchasers if parts of it were saleable in lots at the date of taking. There is no real point of distinction in principle between that case and this one; that decision was correct and the court did not allow itself to be deflected from the path of ascertaining the true value to the owner. *Marshall* v. *Minister of Works*[11] appears to be the first reported case dealing with the issue of compensation for land taken subsequently to the *St. John's College* case,[12] and the judge appears to carry the principle of the latter case rather further than is warranted. The Australian case of *Turner* v. *Minister of Public Instruction*[13] is distinguishable, first, because there was no finding of fact, as there is in the present case, of part or all of the land being saleable in lots at the date of taking. If the inference is to be drawn that the reference to such words as " subdivision " gives it the same meaning as the finding of fact in the present case, then it is submitted that the decision was erroneous. The second point of distinction is that the statutes in question are different. The whole reasoning on which the majority is based is distinguishable from what has to be considered in the present case. The principles enunciated by the Full Court in the *St. John's College* case[14] are consistent with established principles of law, and if applied to the facts of any particular case will ensure full value to the owner within the statutory meaning of the term.

Patrick O'Connor following. The Land Valuation Court should consider as a question of fact whether consent of the Minister would be forthcoming or not. If the answer is that there was no reason why the permission should not be given, then the restriction should be disregarded in valuing the land. Further, it was extremely unlikely that consent would be withheld.

H. R. C. Wild Q.C., S.-G. of New Zealand, and *J. D. F. Moylan* for the respondent. There are a number of statutes of New Zealand and of Australia on the determination of compensation. Lands Clauses Acts were considered in what may be called the lands clauses cases: *Gajapatiraju's* case[15]; *Spencer* v. *Commonwealth of Australia*[16]; *Grace Brothers Pty. Ltd.* v. *The Commonwealth*[17]; *Turner's* case,[18] and *Thistlethwayte's* case.[19] Until 1936 there was in New Zealand a similar provision in section 79 of the Public Works Act, 1928. The second group of statutes is based on the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2: *Horn* v. *Sunderland Corporation.*[20] In 1936 the New Zealand legislature repealed section 79 of the Public Works Act, which was on the lands clauses pattern. and adopted the second rule of section 2 of the United Kingdom Act of 1919; it was the Finance Act (No. 2) of 1936, s. 28. Then in 1944 section 28 of the Act of 1936 was repealed and replaced by the section in question in this case, section 29 of the Finance Act (No. 3) of 1944, and the substantial difference was that rule 1 of section 2 of the Act of 1919 was then adopted in New Zealand. The essential difference between the two classes is that in the lands clauses cases the tribunal is required merely to have regard to or take into account the value of the land; the statute says nothing as to the manner in which that value is to be determined; it was left to judicial interpretation. *Spencer's* case[21] laid down the test of willing seller; and in *Gajapatiraju's* case[22] the Board said that that was the test under the Indian Act. But that test of willing seller was one which could be and was to be set aside where it was inappropriate; that was shown in *Thistlethwayte's* case.[23]

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[10] [1945] N.Z.L.R. 507.

[11] [1950] N.Z.L.R. 339.

[12] [1945] N.Z.L.R. 507.

[13] 95 C.L.R. 245.

[14] [1945] N.Z.L.R. 507.

On the other hand, in the second class of cases, into which the New Zealand provision fell, Parliament has laid down how the value of the land is to be arrived at—there is placed on the court the mandatory duty to take the value of the land as the amount which the willing seller would realize. The test of a willing seller at the specified date is *the* method and the only method. A second feature of the New Zealand section is that it goes further than section 2 of the United Kingdom Act of 1919 in that it specifically fixes the date at which the sale is deemed to take place. In the United Kingdom the date was when the notice to treat was given.

What is significant and of extreme importance is the importance which the courts have attached to the state of things as

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[15] [1939] A.C. 302.

[16] (1907) 5 C.L.R. 418.

[17] (1946) 72 C.L.R. 269.

[18] 95 C.L.R. 245.

[19] [1954] A.C. 475.

[20] [1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480.

[21] 5 C.L.R. 418.

[22] [1939] A.C. 302.

[23] [1954] A.C. 475.

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they existed, and the state of the land, at the date in question, whatever it may be: *In re Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd. and Pontypridd Waterworks Co.*[24]; *Horn* v. *Sunderland Corporation*[25]; *Grace Brother's* case[26] and *Gajapatiraju's* case.[27] Those four authorities show that what the compensation tribunal must look at at the relevant date are the circumstances then in existence as facts; the physical condition of the property at the moment when the value has to be fixed; and while possibilities are to be taken into account they must be looked at as possibilities; they must not be accounted as realized possibilities. The proper inference to be drawn from the words "upon a subdivision" is that they import the meaning "upon "a subdivision having been carried to the stage when sales in "lots could in fact be made."

Three matters are to be considered as standing between the ability of the owner to sell the land in lots on the specified date: (1) the consent of the Minister under the Maori Purposes Act, 1943, s. 8 (9) (*a*); (2) the approval of the scheme planned under the Land Subdivision in Counties Act, 1946, s. 3 (2); and (3) completion of the subdivision to a point when sales in lots could be made. There is a difference between the consent of the Minister under the Act of 1943 and the approval under the Act of 1946. [*Thomas* v. *Valuer-General*[28] was referred to.] The obtaining of the approval under section 3 (2) is no mere formality. On the contrary, the question of approval or no approval involves a very careful consideration of the scheme, of the needs of the area in relation to the roads, drainage, reserves and so on; and, moreover, as to the co-ordination of those matters with the surrounding boroughs. It was because consent under section 3 (2) had not been obtained that it was conceded by the appellant in the Court of Appeal that sale in lots on the specified date was not legally permissible. If that be right, it is enough to dispose of this appeal.

There was, however, more than just the legal requirement of Ministerial approval standing in the way of sale of lots on the specified date, for the subdivision had to be carried out to a point where sales in lots in fact could be made. Even if there had been Ministerial approval on the specified date or the day after, the sales could not have been made on the specified date. The judgment expressed in the formal judgment of the Court of

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[24] [1902] 2 K.B. 135; 18 T.L.R. 604.

[25] [1941] 2 K.B. 26.

[26] 72 C.L.R. 269.

[27] [1939] A.C. 302.

[28] 37 N.Z.L.R. 164.

Appeal is right. On the facts of this case the land must be valued as a whole. The true position is admirably stated in the judgment of Shorland J.: "If matters so stand that the owner could not "on the specified date have sold the land in individual allot- "ments . . . then plainly 'the amount which the land if sold "'in the open market by a willing seller might be expected to "'realize' . . . is, in my view, restricted to the amount which a "willing seller could be expected to obtain by the only method "of realization available to him on the specified date, namely, "by sale in one piece with all its then existing potentialities. "Such amount cannot, in my view, include the hypothetical "profit which the purchaser might at some future date expect "to realize upon the completion of subdivision and sale in allot- "ments to several purchasers." The judgment of the Court of Appeal is in accordance with that proposition and is founded on the following cases: *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* [29]; *Fraser* v. *City of Fraserville* [30]; *Gajapatiraju's* case.[31] Another authority which is entirely consistent with the decision in the present case is *Turner's* case [32]; Williams J., dissenting, would not there have taken the view he did if he had been giving his decision on the New Zealand section and not on a statute following the lands clauses pattern. It cannot be assumed that the decision in *Turner's* case [32] would have been any different if the facts had been as they are in the present case.

The *St. John's College* case [33] is the only decision at variance with the submission for the respondent here. There are three submissions on that case: (1) The question that is of importance here, namely, whether, as the appellant submits, a legal restriction on sale in subdivision can be disregarded, was not before the court in the *St. John's College* case [33]; so it is not good authority for assisting the appellant in his principal contention—that the court should in the present case assume that the Minister's consent had been given. (2) The *St. John's College* case [33] is distinguishable from the present case on the ground that the land in that case either was or was treated as being immediately saleable in lots, whereas here the land was in an undeveloped state, without road access and without roads. (3) If either of the above two grounds of distinction is invalid, then it is submitted that the *St. John's College* case [33] was wrongly decided. It is contrary to established authority, which says that the land must be taken as it is.

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[29] [1914] A.C. 569; 30 T.L.R. 293.

[30] [1917] A.C. 187; 33 T.L.R. 179.

[31] [1939] A.C. 302.

[32] 95 C.L.R. 245.

[33] [1945] N.Z.L.R. 507.

It would be quite improper for the Maori Land Court to assume a sale in lots on the specified date, (i) because section 3 (2) of the Land Sub-division in Counties Act, 1946, made a sale in lots on that date illegal, the Minister's approval not having been given; (ii) because in view of the Minister's powers under the Act no one could be certain until the approval was given what shape and form the subdivision scheme would finally take, or, indeed, whether there would be any approval at all. The appellant's principal submission amounts to an invitation to the Board to declare that the Maori Land Court can treat the possibility that the land might later be capable of sale in lots as a realized possibility. Of the two cases cited in support of his main submission, *Corrie* v. *MacDermott*[34] really supports the respondent, and *Minister for Public Works* v. *Thistlethwayte*[35] is distinguishable. [*Commonwealth of Australia* v. *Arklay*[36] was also referred to.] In paragraph (3) of the formal judgment of the Court of Appeal the word "legally" should be deleted and "in law and "in fact" inserted before the word "subdivided." With that suggested amendment, the formal judgment provides a formula which does justice to the expropriated owner.

Blundell in reply. The facts here are somewhat different from those in both the *St. John's College* case[37] and *Turner's* case.[38] The position ought to be looked at as the Maori Land Court found on the evidence it would have been but for the actions of the taking authority. Whether a man is a willing seller is to some extent always a question of fact, and one must inquire into all the circumstances whether he can be a willing seller.

October 2. The judgment of their Lordships was delivered by Lord Keith of Avonholm, who stated the facts set out above and continued: Their Lordships construe the findings of fact in the case stated, as narrated above, as meaning that there was at the date of the taking no more than a paper plan of a proposed subdivision, and that if the approval of this plan had been received from the appropriate Minister and the subdivision had been in fact carried out by the provision of the necessary roads, drainage, and other facilities, some of these lots could have been sold immediately for residential or industrial purposes and the balance sold in lots from time to time over a period of years subsequent to the taking. This their Lordships take to correspond to the view expressed somewhat more shortly by Shorland J. where he says: "The words 'upon a subdivision' are taken from the case "stated, but they require some amplification. I construe the "words 'upon a subdivision' as meaning upon a subdivisional "scheme having received the approval of the appropriate Minister "of the Crown, and having been completed to the stage at which "the owner could in fact and in law sell the subdivided allot-"ments to separate purchasers."

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[34] [1914] A.C. 1056.

[35] [1954] A.C. 475.

[36] 87 C.L.R. 159.

[37] [1945] N.Z.L.R. 507.

[38] 95 C.L.R. 245.

Their Lordships are not clear what is involved in the content of the second question of law submitted by the Maori Land Court. If it refers to lots in fact subdivided by the owner at the date of the taking, there were no such lots. If it refers to a notional subdivision by the owner in accordance with the development plan their Lordships are of opinion for the reasons to be given that no valuation upon such a hypothetical sale in subdivision can be entertained. It is probably because of the difficulties underlying this second question of law that the Court of Appeal thought proper to give their decision in the form in which they did.

It is fundamental that the land must be valued in its state at the time of the taking. Under the Act of 1944 that value is to be assessed at the amount which a willing seller might be expected to realize if the land were sold in the open market at the date of the taking. This is not necessarily the price which it would fetch because the costs of realization will have to be taken into account. Section 29 corresponds to section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, in the United Kingdom, which did away with the extravagant claims and extravagant awards that were frequently made under the Lands Clauses Acts and similar legislation on the view that the owner was an unwilling seller. What in effect is being computed is the capital value of an asset, and while in the case of land it may not always be as easy to calculate this as it would be in the case of ascertaining the market price of easily realizable stocks or shares or commodities in the field of commerce, the problem does not generally present any great difficulty in the hands of competent land valuers. There are, however, as has frequently been observed, cases where land has a potentiality which may be realizable in the foreseeable future and, if so, will give the land an added value over and above its value for the uses made of it at the time of the taking. As the case of *Vyricherla Narayana*

Gajapatiraju v. *Revenue Divisional Officer, Vizagapatam*[1] shows, the task of valuing land with such a potentiality may not always be an easy one. And in such cases it is difficult to envisage a sale to more than one hypothetical purchaser who is prepared to buy the land with a view to developing and realizing the benefit of this potentiality. There seems no reason, however, why this need be in all cases an inevitable assumption. If the area of land taken, for instance, is so large as to be capable of building development in the hands of separate purchasers operating in different sections of the total area, more than one hypothetical purchaser could be imagined. But for purposes of valuation the result would seem to be immaterial. The value of the whole in the open market for building development would seem to be equivalent to the sum of the values of the various parts if sold separately for the same purpose. The costs to the seller might be slightly greater in the one case than in the other, and this might lead to the assumption of a slightly higher market price in cumulo in the case of a sale to a number of purchasers. But as the costs of realization would be a factor to be taken into account in calculating the amount realized by the owner, the results at the end of the day should be very much the same. A similar situation might exist if there had to be assumed a sale of six houses by a willing owner-seller in the open market. He could hardly be expected to sell them in a single lot to one purchaser for less than he could realize by selling them separately to six purchasers. The purpose of the transactions in the illustrations given would, of course, be different, for in the case of land of which the value has been fully realized in the hands of the owner its sale would be for the personal use of the purchaser or as an investment having profit-bearing qualities and possibilities of capital appreciation, whereas in the case of land with a development potentiality the value of the land has not yet been fully realized, and the land may be bought with the view, by further capital outlay, of realizing this potentiality. This necessarily leads to very different considerations in arriving at an estimate of market price.

In the case of the land in question here there are, in their Lordships' view, three material factors which the compensation tribunal must have in view. First, the consent of the Minister of Maori Affairs had to be given to any sale of the land in question by the Maori Trustee under section 8 (9) (*a*) of the Native Purposes

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[1] [1939] A.C. 302; 55 T.L.R. 563.

Act, 1943. Secondly, the plan could not be carried into execution without the consent of the Minister of Maori Affairs or delegated authority as required by the Land Sub-division in Counties Act, 1946. Their Lordships find it unnecessary to go through the provisions of this Act, but it contains an absolute prohibition of the sale of any allotment of less than 10 acres in any subdivision or the formation of any proposed road in connexion therewith unless the scheme plan has been previously approved by the Minister or delegated authority. It is clear that as a scheme of land development the plan, if it had ever got to the stage of consideration by the Minister, might have been very materially modified in the matter of roads, drainage, accesses, the establishment of reserves, co-ordination with adjacent areas and other respects, if it were not entirely scrapped and had to be written anew. Thirdly, there were in fact no subdivided lots as shown on the plan, no roads, fences, accesses, drainage or other facilities. The land was still land that had to be developed for subsequent occupation as building land.

In the case of the first of these factors it may be easy for the compensation tribunal to assume that the consent of the Minister of Maori Affairs would have been given, as this was a scheme, as their Lordships were given to understand, for the benefit of the Maoris. The second factor raises very different considerations. The question whether, but for the notice to take and the subsequent taking by Proclamation, the Minister would have approved of the proposed scheme clearly involves problems for the compensation tribunal on which their Lordships can only speculate and are unable to enter. It may be that all that can be affirmed is that at the date of the taking the land was ripe for building development to a greater or less extent under some scheme or another which would be likely to obtain ministerial approval. In short, the compensation court would have to consider the likelihood of the proposed scheme being approved by the Minister, or, if not, some alternative scheme, very much as they might have to estimate the probability of some restrictions on sale, temporary or otherwise, being removed, as pointed out by Lord Dunedin in *Corrie* v. *MacDermott*.[2] This all leads up to the third consideration mentioned, that there were at the date of the taking no subdivisions in fact. The task of the compensation court, as their Lordships see it, is to estimate how far the land was ripe at the date of the taking for subdivisional development and how soon.

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[2] [1914] A.C. 1056, 1064.

looking to the need of obtaining any necessary consents, the land would in fact, but for the taking, have been fully developed, and to value it accordingly.

With one qualification, their Lordships would agree with the following passage in the judgment of Gresson J.: "In my opinion "in this case the land must be valued for what it in fact was on "the specified date—a tract of land capable as to some, perhaps "all of it, of subdivision into building allotments, and of being "sold at some time and over some period in that form. That "circumstance would influence a purchaser in his determination "of price. In estimating what price a purchaser would be willing "to pay recourse may be had to an examination of the estimated "gross yield from a subdivision as yet notional only, and the "estimated deductions that a purchaser would have to take into "account; but that is the extent to which a notional subdivision "can be regarded. There must be excluded from the court's "contemplation retention by the claimant and an assessment of "what in his hands it would yield if subdivided, because that "course is not open to him. At the time value has to be determined the land was in fact not—legally speaking—subdivided "so as to permit of sale piecemeal. A good deal requires to be "done before there can be disposal in that manner, and as well as "expenses there will be risk and delay."

Their Lordships would accept this as an accurate statement of the position though, in their opinion, the passage would suffer in no way if the words "legally speaking" were omitted. In accepting this statement of opinion their Lordships understand the judge by the words "legally speaking" to be referring to a previous passage in his opinion where he says "it is lawfully open "to award compensation upon the basis of a sale to several "purchasers in lots according to a subdivision but only if in fact "there is such a subdivision as would permit of this course being "adopted at the relevant date." In the present case the land could not in fact be subdivided into lots available for immediate sale without the prior consent of the competent authority, and for that reason it may be not inapt to refer to a subdivision either as a lawful subdivision or a subdivision in fact. But the crucial and deciding factor in their Lordships' view is a subdivision in fact which has been lawfully carried out.

In the Court of Appeal all the judges felt difficulty from an earlier decision of the Supreme Court of New Zealand in *St.*

John's College Trust Board v. *Auckland Education Board*.[3] Gresson and Shorland JJ. found reasons for distinguishing it and, it would seem, accepted it as a good decision on its special facts. Adams J. thought it was wrongly decided. Their Lordships agree with Adams J. It is unnecessary to examine the facts of that case in detail. As was stated by Myers C.J., who gave the judgment of the court, it was common ground that the land was suitable for subdivision into allotments for building purposes, and that compensation should be awarded on that basis. There was no legal impediment to a subdivision. As appears from the case, both the claimant and the respondent submitted in evidence plans of hypothetical subdivisions of the land taken. It is clear that there was in fact no subdivision of the land and that the land had the potentiality of subdivision. This potentiality was estimated by witnesses as being fully realizable in a relatively short period of time. The contest between the parties was whether the value of the land should be assessed on the assumption that the owner would have made his own subdivision, and would have sought to sell the resultant building sections direct to purchasers, or upon the assumption of a sale by the owner to a purchaser who, having purchased, subdivided the land into building allotments and marketed them. For present purposes the material part of the court's judgment is in the passage which runs[4]: "If then the claimant is able to show that there was a "market for the subdivisions as on December 15, 1942 [the "relevant date], and that the subdivisions could then have been "sold, it is open to the compensation court to award compensa-"tion upon the assumption that, on that date, the claimant sold "the land to several purchasers in lots accordingly." In their Lordships' view this was an erroneous direction in law for the reason that there were in fact no subdivisions, and that to give the claimant compensation on the basis that there were, would be to give him compensation for unrealized possibilities as if they were realized possibilities.

The High Court of Australia had occasion to consider this very question in *Turner* v. *Minister of Public Instruction*[5] under section 124 of the Public Works Act (N.S.W.), 1912, which, though couched in different language, for present purposes may be regarded as introducing the same considerations as section 29 (1) (*b*) of the New Zealand Act. The land in that case was about five acres in extent, and was suitable for subdivision into 19 residential allotments but had not, in fact, been subdivided. As stated by Dixon C.J., the case raised the precise question that arises here. He said [6]: " In the case of the land in question no steps " had been taken for sub-division. It was necessary to survey " it, to prepare plans for sub-division, to obtain the consent of " the local authority, to make streets or roads and then to place " it upon the market. As the land stood it was incapable of sale " in sub-division and it was necessary to make improvements or " alterations in its physical condition before the sub-divisional " prices could be obtained. In those circumstances it could not " be sold in sub-division at the time of resumption. It was not " therefore possible to ascribe to the owner possession of the " present value of its sub-divisional potentialities on the footing " that all you should do is to estimate what he would gain if he " sub-divided the land at a future date and reduced the result to " its then present value. This means, too, that the conclusion " is clearly right which the learned judges of the Supreme Court " expressed in the passage already quoted from their judgment, " viz.: ' . . . the only sale that could be considered is a sale of " ' the land as it was at the date of resumption, that is unsub- " ' divided, but having the clear potentiality that it was fit for " ' sub-division.' "

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[3] [1945] N.Z.L.R. 507.
[4] Ibid. 513.
[5] (1956) 95 C.L.R. 245.

The opposed questions in the case were whether the compensation for the resumption of the land was to be determined (1) by reference to a hypothetical sale of the land at a price equivalent to the net amount which the owner might have expected to realize on subdividing it and selling it in subdivision, less only an allowance for the risk of realization, or (2) by reference to a hypothetical sale in globo to a purchaser buying with a view to subdividing and selling in subdivision, and prepared to pay for the land no more than such a sum as would return to him out of the transaction an amount representing an appropriate allowance for the risk of the venture and a profit to himself. The majority of the court (Williams J. dissenting) agreed that the first question should be answered in the negative, and while Dixon C.J. did not think that the second question could be answered affirmatively as a matter of law, the rest of the majority members (Fullagar, Kitto and Taylor JJ.) agreed that the Supreme Court of New South Wales, from whom the appeal had come, had correctly answered this question in the affirmative.

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[6] 95 C.L.R. 245, 269.

At the hearing before their Lordships' Board in the present case appellant's counsel were faced with the difficulty that, on their submission, the land, on the assumption of its being retained for sales in subdivision by the owner, should be assessed at a higher value than if it were sold to a hypothetical purchaser for similar development. In their Lordships' view it is impossible that the land should have two values, on the hypothesis required by the statute that it is sold in the open market by a willing seller. Both Kitto J. and Taylor J. in the case just cited dealt with this point in a manner that seems to their Lordships unexceptionable. The land in the hands of the owner is just capital for whatever purpose he chooses to put it. And if he chooses to employ his capital in a subdivisional scheme the profit he will make cannot in anticipation be taken to increase the value of the land before that profit has been realized. As Kitto J. among other passages puts it [7]: "There simply cannot be a difference between "the price which would be agreed upon between a businesslike "purchaser and a businesslike vendor and the amount which a "businesslike owner would treat himself as leaving invested in "the land in the event of his deciding to retain it"; or as Taylor J. says [8]: "The land at the relevant time was worth no more in "the hands of the appellant than it would have been in the hands "of some other owner who had acquired it with a view to sub-"division." The matter may be stated in another way. If the owner be regarded as a hypothetical purchaser of the land to be valued wishing to buy it for subdivision, he would not be expected to pay more for it than any other purchaser buying for the same purpose.

In these circumstances their Lordships' Board are unable to agree with the appellant's submissions. They consider, however, that the third head of the opinion expressed in the order of the Court of Appeal should be varied. This seems to proceed upon the view taken by a majority of the court that the case of *St. John's College Trust Board* [9] was correctly decided on its special circumstances, and leaves it open to the compensation court to follow that decision if it thinks the facts warrant it. As the view of the Board is that that case was wrongly decided, and as in any event the Board cannot agree with the way in which this direction is expressed, their Lordships are of opinion that the direction should be as follows:

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[7] 95 C.L.R. 245, 291.

[8] Ibid. 299.

[9] [1945] N.Z.L.R. 507.

"(3) The court must contemplate the sale of the land as a "whole unless it appears that the necessary legal consents to a "subdivisional plan had been given and a survey on the ground "at the specified date would have disclosed that the land or some "part of it was in fact so far subdivided that the subdivided "parts could at that date have been immediately sold and title "given to individual purchasers, in which case the parts so subdivided may be separately valued, for the purpose of arriving "at the total amount of compensation."

For the reasons given, their Lordships will humbly advise Her Majesty that the appeal should be dismissed, but that the order of the Court of Appeal should be varied in the manner above expressed. The appellant must bear the costs of the appeal.

Solicitors: *Wray, Smith & Co.; Mackrell & Co.*

C. C.

[HOUSE OF LORDS.]

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Jan. 27, 28, 29;
Feb. 27.

BETTY'S CAFES LTD. . . . . . . APPELLANT;

AND

PHILLIPS FURNISHING STORES LTD. . RESPONDENT.

Landlord and Tenant—Business premises (security of tenure)—Landlord's intention to reconstruct—Time of intention—Meaning of "intention"—Meaning of "proposals"—Landlord's intention to occupy for own purposes—Whether bar to relief—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 26 (6), 30 (1) (*f*) (*g*), 31 (1).

Judicial Precedent—Court of Appeal decision—Two grounds—One obviously wrong—Whether Court of Appeal may overrule it.

By section 26 (6) of the Landlord and Tenant Act, 1954: "Within two months of the making of a tenant's request for a new "tenancy the landlord may give notice to the tenant that he will "oppose an application to the court for the grant of a new tenancy, "and any such notice shall state on which of the grounds mentioned in section 30 of this Act the landlord will oppose the "application."

By section 30 (1): "The grounds on which a landlord may "oppose an application under subsection (1) of section 24 of this "Act are such of the following grounds as may be stated in the "landlord's notice under section 25 of this Act or, as the case may "be, under subsection (6) of section 26 thereof, that is to say:

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD DENNING.

"... (*f*) that on the termination of the current tenancy the "landlord intends to demolish or reconstruct the premises comprised "in the holding or a substantial part of those premises or to carry "out substantial work of construction on the holding or part thereof "and that he could not reasonably do so without obtaining possession of the holding; (*g*) ... that on the termination of the "current tenancy the landlord intends to occupy the holding for "the purposes ... of a business to be carried on by him therein."

By section 31 (1): "If the landlord opposes an application "under subsection (1) of section 24 of this Act on grounds on which "he is entitled to oppose it in accordance with the last foregoing "section and establishes any of those grounds to the satisfaction of "the court, the court shall not make an order for the grant of a "new tenancy."

Since 1925 the tenants had carried on their business in premises held under a series of leases, none of which granted a term exceeding eight years. In 1954 the landlords, a limited company, had purchased the reversion expectant on the tenants' term with a view to occupying the premises for their own business. Because they had done so less than five years before the termination of the tenancy they were precluded by section 30 (2) from relying on paragraph (*g*) of section 30 (1). On June 28, 1955, the tenants served a notice under section 26 of the Act asking for the grant of a new tenancy for a term of 14 years. On August 15, 1955, the secretary of the landlord company gave notice to the tenants that they would oppose the grant of a new tenancy under section 30 (1) (*f*), stating: "The grounds on which we shall oppose any application which you may make to the court ... are that ... we intend "to reconstruct the premises ..." At the time no resolution to that effect had been passed by the board. On April 16, 1956, the hearing of the application began before Danckwerts J. On April 23, before it was completed, the board of the company passed a resolution that, in the event of possession being obtained, a scheme prepared in January, 1955, should be carried out and that expenditure up to £20,000 on the works should be approved and that counsel should be authorized to give an undertaking to that effect. Danckwerts J. held that the intention so expressed had the necessary qualities of fixity and genuineness. It was not disputed that it had not been proved that such an intention existed at the date of the notice of opposition:—

Held, (1) (Lord Keith of Avonholm dissenting), that the intention established by the landlords was sufficient to negative the grant of a new lease; the landlords proved the intention required by section 30 (1) if they proved its existence at the date of the hearing.

Per Lord Denning. The landlord must honestly and truthfully state his ground in his notice and establish it as existing at the time of the hearing.

Definition of "intention" by Asquith L.J. in *Cunliffe* v. *Goodman* [1950] 2 K.B. 237, 253; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720 approved.

Held, (2) that the fact that the landlords might intend to occupy the rebuilt premises themselves did not deprive them of the right to possession under paragraph (*f*), since they could satisfy its conditions; such a deprivation was not implied in it when read with paragraph (*g*).

Fisher v. *Taylors Furnishing Stores Ltd.* [1956] 2 Q.B. 78; [1956] 2 All E.R. 78 approved.

Atkinson v. *Bettison* [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340 considered.

Decision of the Court of Appeal [1957] Ch. 67; [1957] 1 All E.R. 1 affirmed.

APPEAL from the Court of Appeal (Birkett and Romer L.JJ., Lord Evershed M.R. dissenting).

This was an appeal from an order of the Court of Appeal dated November 28, 1956, after a hearing on October 4, 8, 9, 10 and 11, 1956, setting aside the order of Danckwerts J. in the Chancery Division of the High Court of Justice dated May 7, 1956, after a hearing on April 16, 17, 18, 19, 23 and 24, 1956, whereby it had been ordered, pursuant to the provisions of Part II of the Landlord and Tenant Act, 1954, that a new tenancy of certain business premises, 42–44, Darley Street, Bradford, in the County of York, be granted to the appellant company, Betty's Cafés Ltd., for the period of 14 years from June 24, 1956, at a rent of £3,000 per annum and otherwise on the terms of a lease dated April 29, 1946. The respondent company, Phillips Furnishing Stores Ltd., as landlords of the premises within the meaning of Part II of the Act, relied, in opposition to the appellant company's claim for the grant of a new tenancy, on the ground of opposition specified in section 30 (1) (*f*) of the Act.

The facts are fully stated in the opinion of Viscount Simonds.

Charles Russell Q.C., *Lionel Blundell* and *Christopher Priday* for the appellant company. This case will be argued for the appellants on the basis that, if the other points are decided against them, the second judgment of Danckwerts J. after the case was remitted to him by the Court of Appeal, viz., that the respondent company's resolution of April 23, 1956, expressed the necessary qualities of fixity and genuineness of intention, was right.

As to the time when the fixed intention to reconstruct the premises under section 30 (1) (*f*) of the Landlord and Tenant Act, 1954, must exist, the only relevant dictum in *X.L. Fisheries Ltd.* v. *Leeds Corporation*[1] is that cited in the judgment of

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[1] [1955] 2 Q.B. 636, 646; [1955] 2 All E.R. 875.

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Danckwerts J. in the present case.[2] See also *Reohorn* v. *Barry Corporation.*[3]

After the tenant has given his notice of request for a new tenancy, then, in order to object on any of the grounds set out in section 30 (1) of the Act, the landlord must form the requisite intention before two months elapse, i.e., during the period within which he may serve a counter-notice under section 26 (5). Unless he does so he cannot object. A landlord with important reconstruction proposals before him will have had them in mind for some time. When the tenant applies to the court, quite a short time may elapse between his notice claiming a new lease and the hearing of the application.

There is no particular magic in the word " grounds " in section 30 (1). The grounds are merely a series of points. The purpose of the requirements of section 30 is that after two months, if no relevant facts are alleged in a notice by the landlord, the tenant should know that his way is clear. Similarly, the tenant will know that his way is clear if the landlord has served a notice but the facts stated therein are not presently true. What the landlord must prove at the hearing is that at the date of his notice what was stated therein was true.

Here it is an essential part of the landlords' right to oppose that they should have stated in their notice that which is set out in section 30 (1) (*f*), that they should have said " We intend." When they come to " establish " the truth of that statement under section 31 (1), they must establish that it was truly made at the time when it was made and when it had to be made as a condition of their title to oppose at all. The intention must also exist at the date of the hearing. Paragraphs (*a*), (*b*), (*c*) and (*d*) indicate that the ground must exist at the date of the notice and that the relevant moment for the intention referred to in paragraph (*f*) is that of the notice of the landlord. In paragraph (*a*) " state of repair " is mentioned; in paragraph (*b*) persistent delay; in paragraph (*c*) " substantial breaches." In paragraph (*d*) " has offered " must refer to an offer made before the notice, and " is willing," " is available " and " are suitable " must refer to a state of affairs at the date of the notice. It would be strange if the legislature intended to refer to a different point of time in paragraph (*f*).

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[2] [1956] 1 W.L.R. 678; 689; [1956] 2 All E.R. 497.

[3] [1956] 1 W.L.R. 845, 850; [1956] 2 All E.R. 742.

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As to the nature of the intention, see *Reohorn* v. *Barry Corporation.*[4] Intention imports a reasonable prospect of being able to carry out what is intended. If the intention is put too high it makes it unlikely that the landlord had it at the date of the notice.

Alternatively, if the intention need not be established to exist at the date of the landlord's notice, it must at least be shown to be existing at the time when it is first for the landlord to state his ground of opposition in the proceedings instituted by the tenant and, if that be the relevant point of time, the appellants must succeed.

In this case the landlords' expressed intention is purely ancillary to an intention to occupy the premises for the purposes of their own business. Section 30 (1) (*g*) contains a provision for recovery of possession by a landlord, but by subsection (2) the respondents are debarred from relying on that ground, since it is available only to landlords who have acquired the reversion at least five years before the end of the current tenancy. That bar covers any steps taken by the landlord by way of reconstruction or adaptation necessary for that purpose. Here there are operations which are necessarily involved in the purpose covered by (*g*). The provisions of (*f*) are not intended to overlap those of (*g*). Thus, since the sole purpose of the respondents' proposed reconstruction was to use them for their own occupation in their own business, in point of time their real reason for resisting the grant of a new lease falls under (*g*), and this deprives them of the right to rely on (*f*): see *McKenna* v. *Porter Motors Ltd.*[5]; *Atkinson* v. *Bettison*[6]; *Fisher* v. *Taylors Furnishing Stores Ltd.*[7] and *Town Tailors Ltd.* v. *Peacock's Stores Ltd.*[8] *Fisher's* case[9] was correctly decided on its facts, but the reasons, so far as they deviated from *Atkinson's* case,[10] were wrong.

If the appellants are right so far, the question arises, What should be the period of the new lease? In such a case an appellate court will not interfere with the trial judge's assessment of the right period just because the court would have granted a different period if it had been in his position, unless he has made an error in law or has failed to take into account something which he should have taken into account: see *Fleet Electrics Ltd.* v.

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[4] [1956] 1 W.L.R. 845, 849, 856.

[5] [1956] A.C. 688, 694; [1956] 3 All E.R. 262.

[6] [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340.

[7] [1956] 2 Q.B. 78, 80, 81, 82, 83, 85, 86–87; [1956] 2 All E.R. 78.

[8] (1956) 167 Estates Gazette 292.

[9] [1956] 2 Q.B. 78.

[10] [1955] 1 W.L.R. 1127.

Jacey Investments Ltd.[11] and *Upson's Ltd.* v. *E. Robins Ltd.*[12] Different minds will balance the different factors in different ways, but unless it can be shown that the trial judge made a mistake akin to taking a 1 oz. weight for 25 lbs. the appellate tribunal will not interfere. Litigation would be interminable if an appellate tribunal could normally substitute its own opinion on such a point for that of the trial judge—a very dangerous course. The order of Danckwerts J. should be restored as it stands.

Lionel Blundell following. If Parliament had so intended, the Act could have provided that in no case where the landlord was debarred by section 30 (2) from invoking section 30 (1) (*g*), because his interest was acquired less than five years before the end of the current tenancy, should a new lease be granted for a period of more than five years. But it was not so provided, and a landlord is liable to be debarred from recovering possession for an unspecified period of up to 14 years: section 33.

Part II of the Act is designed to give greater security of tenure to business tenants. It is different from the case of residential tenants in Part I. In Part II one may be dealing with small or large shopkeepers or industrial undertakings. The tenant is to get a minimum of six months' notice of disturbance. The case of a landlord taken by surprise by a tenant's request for a new lease is not a real hardship because, if he has not formed a definite intention with regard to the property but has a project in mind, he can oppose the grant of a 14 years' lease and the judge has a discretion as to the terms of a new tenancy, so that he may include, if he thinks fit, a "break clause."

There is formality about the documents which must be served under the Act. If a landlord wishes to terminate a tenancy he must serve a special sort of notice. A tenancy is terminated by the exchange of formal notices and the effect produced is that of a common law notice to quit. The notice to terminate a tenancy is analogous to the notice to quit but has greater formality. A notice to quit must always be of sufficient clarity to enable the tenant to act on it, and the same principle applies to a notice to terminate a tenancy under the Act.

If the respondents are right that at the date of the landlord's notice under section 30 (1) (*f*) he need have no intention to reconstruct the premises, then, if the tenant goes no further and does not bring proceedings, the landlord need never have

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[11] [1956] 1 W.L.R. 1027, 1036–1037; [1956] 3 All E.R. 99.

[12] [1956] 1 Q.B. 131, 135, 136, 137, 139, 142; [1955] 3 All E.R. 348.

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any such intention at all because there will be no hearing at which the landlord must establish his intention. In a case under section 30 (1) (*d*) the alternative accommodation need not be available at the date of the notice but must be available when the tenancy ends, but at the date of the notice the landlord must have sufficient control over it to ensure its availability.

As to the bearing of Part I of the Act on the construction of Part II, see section 12 of the Act. In section 12 (1) (*a*) the words used are that " the landlord proposes to demolish," and to satisfy those words a mere revocable, tentative proposal is enough: see the terms of section 13 (1). The scheme of Part I is that when the landlord serves his notice he need only " propose " to apply to the court on the grounds of future demolition. By the time the matter gets to the court the proposal must be elevated by section 13 (2) (*a*) to a requiring of the premises for that purpose. This is in contrast with the terms of section 30 in Part II of the Act. The legislature is presumed to know the judicial interpretation put on " require " and " intend." In Part II the word " intends " means what it says and, unlike Part I, Part II by its terms imports that the word shall have the same quality and force when the notice is served as when the matter comes to court. Otherwise one would expect to find provisions similar to those in Part I. As to the meaning of " intention," see *Cunliffe* v. *Goodman.*[13] The appellants do not quarrel with the conception of " intention " expressed in that case, but there has been a tendency to carry the dictum of Asquith L.J. further than it should be taken, as if he meant to suggest an absolutely inflexible determination. " Intention " does not mean that, but it suggests a reasonable prospect of fulfilment. A barrister may firmly intend to attend the Birmingham Assizes without having yet checked that there is a convenient train running; that would be a matter of detail. An intention may be revocable but not provisional: *per* Cohen L.J.[14]

Further, an intention springing wholly from the landlord's plan to occupy the premises for his own business and to adapt them for his own business is not an intention to demolish or reconstruct within section 30 (1) (*f*).

E. M. Holland Q.C. and *John Widgery* for the respondent company. The first question is: At what date must the landlord's intention to demolish or reconstruct the premises be shown

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[13] [1950] 2 K.B. 237, 252–253; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.

[14] [1950] 2 K.B. 237, 250.

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to exist? There are five possible answers: (1) Only at the date of the hearing, as the respondents say. (2) Only at the date of the notice, as Danckwerts J. and Lord Evershed M.R. held. (3) At both dates, as the appellants contend. (4) At both dates and continually between them. (5) At the date when it is first for the landlord to state his opposition in the proceedings, the appellants' alternative contention. The only method of choosing one of these answers is to see which one the Act justifies by its words.

The Act interferes with freedom of contract and should be so construed as not to interfere with it more than is necessary. The matter depends on the relevant sections bearing on the particular issue. Section 30 opens with words limiting the landlord's right to reliance on certain grounds of opposition. Section 26 (6) has referred to the grounds on which he "will oppose" the application. It would be a great hardship if under that subsection the landlord had to make up his mind within only two months of a tenant's request for a new tenancy on a matter of demolition or substantial reconstruction. That consideration does not apply to section 25 where the landlord is initiating the matter in giving notice to determine a tenancy, and it may be said that in such a case the landlord must have made up his mind before he sets the ball rolling. It is different where the tenant is asking for a new tenancy on his own initiative.

The Act has not said that the landlord must have the requisite intention at two points of time. In his notice of opposition the landlord does not have to say "I intend." He only has to give the grounds on which he "will oppose" the application. Thus under section 30 (1) (*a*) he "will oppose" it on the ground that the premises are out of repair at the date when the matter comes before the court. Section 30 (1) (*f*) is expressed in the present tense and is a perfect parallel to the words "is willing" in section 30 (1) (*d*), and under it the landlord must satisfy the court at the date of the hearing that he intends to demolish or reconstruct. Section 31 (1) makes this clear, and section 26 (6) does not alter the actual meaning of the words. If the landlord's intention is to be ascertained at the date of the hearing, the matter is put on a footing such that justice can be achieved by the exercise of the court's discretion. That is better than adhering rigidly to the period of two months after the date of the tenant's request for a new lease. As to the hardships which acceptance of the appellants' submission would involve, see *per* Romer L.J. in the Court of Appeal.[15]

The provisions in the Act as to actions are purely procedural. The terms of Part I of the Act help the respondents rather than the appellants.

[VISCOUNT SIMONDS intimated that their Lordships did not require to hear argument for the respondents on the appellants' further point.]

As to the term which should be granted if a new lease is ordered, the Court of Appeal was unanimous in considering that it should not be 14 years. The House of Lords should not reverse the Court of Appeal on the sole ground that it has interfered with the decision of the trial judge. To grant a term of 14 years in such a case as this was plainly contrary to the tenor of the Act. It was not found that the respondents never had a genuine intention to reconstruct. They are only precluded from relying on section 30 (1) (*g*) by the provision as to five years in section 30 (2). The case should be remitted back with an indication that five years would be a proper term. The judge's discretion should be interfered with if, on the face of it, it appears to have been exercised without regard to the principles of the Act.

Charles Russell Q.C. in reply. The fact that the respondents genuinely desired to have possession of the premises is not relevant, since at the material time they had not formed any intention to do this work. The court was authorized by the Act to grant a lease up to 14 years in length and it was not contrary to the tenor of the Act to grant a lease in this case for more than five years. It does not appear from his judgment that the judge reached his decision without regard to the principles of the Act.

As to the main point, reliance is placed on section 30 (1), which requires that the landlord must state in his notice what he intends. The gist of the matter is in that subsection, which gives the landlord his title to oppose and imposes requirements on him. It requires him to state in his notice certain matters of fact. The intention of the Act is that he should state them for the benefit of the tenant, not merely that he should prophesy. On the statement of fact made by the landlord, the tenant must be able to make up his mind as a matter of business decision. The respondents' argument involves that there is no need for any intention on the part of a landlord at the date of his notice. But the onus is on the landlord to satisfy the court that he is entitled to oppose, i.e., that he is within section 30 (1). He is in the position of a plaintiff.

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[15] [1957] Ch. 67, 93–94; [1957] 1 All E.R. 1.

Their Lordships took time for consideration.

February 27. VISCOUNT SIMONDS. My Lords, this appeal raises a short question of construction of certain sections of Part II of the Landlord and Tenant Act, 1954, to which I will refer as " the 1954 Act." Concretely, it is whether Danckwerts J. was right, when the matter first came before him, in ordering the respondents to grant to the appellants a new tenancy of certain business premises known as 42–44, Darley Street, in the city of Bradford, for the term of 14 years from June 14, 1956, at a rent of £3,000 per annum and otherwise upon the terms of a lease dated April 29, 1946, to which I will refer later. The Court of Appeal have by a majority (Birkett and Romer L.JJ., dissentiente Lord Evershed M.R.) held that he was wrong in doing so.

It is necessary to state briefly the relevant facts upon which this question arises.

The appellants and their predecessors in title have since 1925 carried on the business of café proprietors and retail confectioners on the greater part, and since June 24, 1955, on the whole of the premises in question under a series of leases, the last of which was dated April 29, 1946, and was for a term of eight years from January 1, 1946, at a rent of £1,400 per annum. On September 23, 1953, the Bradford County Court made an order under the Leasehold Property (Temporary Provisions) Act, 1954, for the grant of a new tenancy of the premises to the appellants' predecessor in title for a term of 12 months from January 1, 1954, at a rent of £2,000 per annum and otherwise on the terms of the said lease. This tenancy was from January 1, 1955, continued by section 24 (1) of the 1954 Act and has since February 17, 1955, been vested in the appellants.

In the meantime, the respondents had acquired the long leasehold reversion of the premises at a price of £38,750, the contract for purchase having been made on August 25, 1953, and the purchase completed on March 1, 1954. It was in the view of the learned judge, which I see no reason to doubt, fairly clear that they hoped to occupy this property for the purposes of their furnishing business. It is also, I think, clear that this idea was never formally given up by the board of directors of the company, though the inconsistent idea of selling the premises to the appellants was favoured by certain of the directors, and was by them carried so far that the appellants felt a legitimate grievance at its abandonment. All this, however, has become of no importance, for your Lordships have to determine this appeal upon two findings of fact, (i) that it was proved that on April 23, 1956, the respondents intended on the termination of the current tenancy to carry out a substantial work of construction on the premises and could not reasonably do so without obtaining possession thereof; and (ii) that it was not proved that they so intended at any earlier date. The relevance of these dates must now be explained.

Part II of the 1954 Act was designed (inter alia) to give a greater degree of protection to the tenants of business premises than they formerly had. To effect this purpose it provided in the first place that a tenancy to which it applied should continue automatically under section 24 until one or other of several events should happen, of which the relevant event for the purpose of this case is that the tenant should, pursuant to section 26, make a request for a new tenancy. That section provided that a tenant's request for a new tenancy might be made in the circumstances therein described (which admittedly covered the present case), and should be for a tenancy beginning with such date not more than 12 or less than 6 months after the making of the request as might be specified therein, with a proviso which I need not state. It further provided that a tenant's request for a new tenancy should not have effect unless it was made by notice in the prescribed form given to the landlord and set out the tenant's proposals as to the property to be comprised in the new tenancy, as to the rent to be payable thereunder and as to the other terms thereof. And by subsection (6) it provided as follows: "Within two months of the "making of a tenant's request for a new tenancy the landlord "may give notice to the tenant that he will oppose an application to the court for the grant of a new tenancy, and any such "notice shall state on which of the grounds mentioned in "section 30 of this Act the landlord will oppose the application."

Taking advantage of this section the appellants by notice in the prescribed form to the respondents dated June 28, 1955, requested the grant of a new tenancy of the premises commencing on June 24, 1956, at a rent of £2,500 per annum for a term of 14 years, the other terms being, except as therein mentioned, those of the existing tenancy.

On August 15, the respondents replied that they were not willing to grant a new tenancy and, following precisely the language of subsection (6) and of section 30 (1) (*f*), said the grounds "on which we shall oppose any application which you "may make to the court for the grant of a new tenancy of the "said property are that on the termination of the current tenancy "we intend to reconstruct the premises comprised in the holding "or a substantial part of those premises or to carry out sub- "stantial work of construction on the holding or part thereof and "that we could not reasonably do so without obtaining possession "of the holding."

On October 27, 1955, the appellants accordingly issued an originating summons in the Chancery Division of the High Court asking that the respondents might be ordered to grant them a new tenancy in the terms of their notice. This summons, having come before the master on certain affidavit evidence, was adjourned to be heard in effect as a witness action by the judge. It was heard with oral evidence before Danckwerts J. on April 16, 1956, and five further days, and on May 7 he gave judgment in favour of the appellants and ordered the respondents to grant them a new lease of the premises for 14 years from June 24, 1956, at a rent of £3,000 per annum.

It is necessary now to remind your Lordships of what proved to be the decisive event of April 23, 1956. On that day at a board meeting of the respondents, the hearing of the case before the learned judge being nearly but not quite concluded, it was resolved: "(1) That in the event of the company obtaining "possession of these premises from Betty's Cafés Ltd. on the "termination of the last-mentioned company's current tenancy "thereof, the works detailed in Mr. Ovenden's specification "dated January, 1955, and plan numbered 45/2 be forthwith "carried out and that expenditure of up to £20,000 upon such "works be approved. (2) That counsel appearing for the com- "pany in the application by Betty's Cafés Ltd. now proceeding "in the Chancery Division be authorized to give an undertaking "either to the court or to Betty's Cafés Ltd. that the above- "mentioned works will be carried out as soon as is practicable "in the event of possession being so obtained."

I have said that the passing of this resolution was a decisive event. But it was not yet to be decisive. For Danckwerts J., while holding that the works in question were a substantial work of construction within the meaning of section 30 (1) of the Act, and that the respondents could not reasonably carry them out without obtaining possession of the premises, held that upon the true construction of the Act the respondents must prove that already at the date when they gave their notice of opposition, namely, on August 15, 1955, they had a firm and settled intention to carry out these works at the end of the current tenancy. He held (and it has not since been disputed) that they had not proved such an intention at that date: he therefore regarded the resolution of April 23, 1956, as irrelevant.

Here, then, my Lords, was the issue upon which the Court of Appeal, though divided among themselves, overruled the learned judge. Was it necessary to prove that the requisite intention was held at the date of the notice of opposition, or was it sufficient to prove that it was held at the date of the hearing? Taking the latter view, the Court of Appeal, not having had the advantage of the learned judge's opinion whether the resolution of April 23 had the requisite quality of a fixed and settled intention, remitted the case to him for his determination of that question. He decided it in favour of the respondents and, accordingly, dismissed the appellants' application for a new lease. In effect, therefore, this appeal raises the single question whether the Court of Appeal were right in holding that the respondents proved the intention required by section 30 (1) of the Act if they proved its existence at the date of the hearing. If your Lordships thought they were not right, then the further question would arise whether the term of the new lease should, if granted, be, as Danckwerts J. determined, 14 years or, as the Court of Appeal unanimously thought, five years only. But this question does not arise.

For the determination of this short question of construction I must refer to certain other sections of the Act. I have already pointed out that under section 26 (6) "the landlord "may give notice to the tenant that he will oppose an application to the court for the grant of a new tenancy, and any such "notice shall state on which of the grounds mentioned in "section 30 of this Act the landlord will oppose the application." I have also, with sufficient precision, referred to the ground, namely, that contained in section 30 (1) (*f*), upon which the respondents gave notice that they would oppose, and in fact opposed, the appellants' application in this case. But, in deference to the argument addressed to us, I set out the grounds mentioned in section 30 (1), (*a*), (*b*), (*c*), (*d*) and (*g*), ignoring (*e*) which neither side found helpful or wholly intelligible. I shall also refer to section 30 (2) and to section 31 (1) as throwing a mild light on the construction. Section 30 (1) is as follows: "The grounds on which a landlord may oppose an application "under subsection (1) of section 24 of this Act . . . under "subsection (6) of section 26 thereof . . .—(*a*) where under the "current tenancy the tenant has any obligations as respects the "repair and maintenance of the holding, that the tenant ought "not to be granted a new tenancy in view of the state of repair "of the holding, being a state resulting from the tenant's failure "to comply with the said obligations; (*b*) that the tenant ought "not to be granted a new tenancy in view of his persistent delay "in paying rent which has become due; (*c*) that the tenant "ought not to be granted a new tenancy in view of other "substantial breaches by him of his obligations under the "current tenancy, or for any other reason connected with the "tenant's use or management of the holding; (*d*) that the land-"lord has offered and is willing to provide or secure the "provision of alternative accommodation for the tenant, that "the terms on which the alternative accommodation is available "are reasonable having regard to the terms of the current "tenancy and to all other relevant circumstances, and that the "accommodation and the time at which it will be available are "suitable for the tenant's requirements (including the require-"ment to preserve goodwill) having regard to the nature and class "of his business and to the situation and extent of, and "facilities afforded by, the holding; . . . (*g*) subject as herein-"after provided, that on the termination of the current tenancy "the landlord intends to occupy the holding for the purposes, or "partly for the purposes, of a business to be carried on by him "therein, or as his residence."

Subsection (2) of section 30 precluded the respondents from taking advantage of ground (*g*), for it made that ground available only to a landlord who had acquired the reversion at least five years before the termination of the current tenancy.

Section 31 (1) provided that if a landlord opposes an application under subsection (1) of section 24 on grounds on which he is entitled to oppose under section 30, and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy.

My Lords, as a preliminary to determining the date when the requisite intention must be proved to have been formed, there was much discussion upon the meaning of the word "intends" in section 30 (1) (*f*). It might be regarded as somewhat academic in this case: for it is conceded that, whatever the meaning of the word, an intention had not been formed at the date of notice of opposition but had been formed on April 23, 1956. But the question has this degree of relevance, that the greater the fixity of intention and the less the mental reservation, the greater the difficulty in supposing that the landlord is to form that intention within two months of receiving the tenant's request or for ever hold his peace. In this context your Lordships have the advantage of a judgment delivered by Lord Asquith (then Asquith L.J.), than whom there have been few greater masters of the English language in judicial interpretation or exposition, in *Cunliffe* v. *Goodman*.[1] I will content myself with a single short passage, though much more might be usefully cited[2]: "An 'intention,'" said the learned Lord Justice, "to "my mind connotes a state of affairs which the party 'intending' "—I will call him X—does more than merely contemplate: it "connotes a state of affairs which, on the contrary, he decides, "so far as in him lies, to bring about, and which, in point of "possibility, he has a reasonable prospect of being able to bring "about, by his own act of volition." I do not think that anything is to be gained by trying to elaborate these words, but I must fairly add that I do not at all dissent from the explanation of them which the learned Master of the Rolls has given in this case. It is a question of fact what intention a man has at a given time, difficult, it may be, to ascertain, but still a question of fact, and I think that a jury directed in such words as these could come to a fair conclusion.

Having said so much, I doubt whether I have got much help on my way to a solution of the question of construction. But perhaps it may be said that it would, in many cases, place an unfair burden on the landlord if within a short space of two months he had to attain the fixity of intention which I have indicated. Content perhaps to await the time when he can resume possession under ground (*g*), he is suddenly faced with an application compelling him to form an intention, which can only be formed after a consideration of a number of factors not easily ponderable. If I felt any real difficulty in construction, I should, I think, find in this consideration an impulse to regard the date of hearing as the relevant and only relevant date for the ascertainment of intention.

Equally from the point of view of the tenant it seems essential that the court should find the intention subsisting at the date of the hearing. As I listened to the argument for the appellants and studied their formal case, it appeared to me that they regarded the date of notice of opposition as the only relevant date. But I have not been able to understand what advantage the tenants could gain from the fact of the landlords' intention at that date or from the proof of it, if at a later stage it had been abandoned. Upon this part of the case I respectfully adopt the reasoning of Romer L.J. upon which I cannot hope to improve.

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[1] [1950] 2 K.B. 237; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.

[2] [1950] 2 K.B. 237, 253.

I return, then, to the short question of construction. Under section 26 (6) a landlord giving notice that he will oppose an application must state in his notice on which of the grounds mentioned in section 30 he will oppose the application. This is the language of futurity. The landlord "will" oppose the application and he "will" oppose it on such and such a ground. If the matter rested there, I should not find it possible to regard the ground of opposition as referring to anything but a state of affairs existing at the date of the hearing when its validity could be tested. It might, no doubt, be relevant for the purpose of testing its validity to know something of the precedent state of affairs: that would depend on the nature of the ground of opposition. But in regard to ground (*f*), which we are immediately considering, nothing more is required of the landlord than that he should state that he will oppose the application on the ground that on the termination of the current tenancy he intends to do certain work and so on. All is still in the future and, except for the purpose of challenging his bona fides, which is not here in question, nothing that has happened in the past has any relevance. At the hearing he will oppose and prove his avowed intention. This seems to me, with all deference to those who take a different view, to be the plain English of section 26 (6) and section 30 (1) (*f*). I have already pointed out that it appears to accord also with the general purpose of the Act. It harmonizes also with the language of section 31 (1) which contemplates the landlord satisfying the court upon any of the grounds upon which he is entitled to oppose the application.

But it has been urged (and for that reason I have set out grounds (*a*) to (*d*) and (*g*)) that, whatever might be said if ground (*f*) stood alone, a different construction is imposed by a consideration of the other grounds of opposition. From this argument I entirely dissent. In the first place I see no reason why different grounds of opposition should not relate to different periods of time. But, in any case, the argument, if bona fides is assumed, is an unreal one. It is not to be supposed that a landlord will base his opposition under ground (*a*), that is, the state of repair of the holding resulting from the tenant's failure to comply with his obligations, if in fact the state of repair at that date gives him nothing to complain of. He will state that he will rely on ground (*a*) if and only if at the date of notice it gives him solid support. At the hearing the judge, whose power to grant a new tenancy is discretionary where this ground of opposition is pleaded, will necessarily take into consideration the state of repair or disrepair, not only at the date of notice, but also at the date of hearing. This appears to me to throw no light upon the meaning of section 30 (1) (*f*). I would make the same observations mutatis mutandis upon grounds (*b*) and (*c*). Perhaps a brighter light is thrown by (*d*), which opens with the words "that the landlord has offered "and is willing," etc. Here the perfect and the present tense are used. Leave out the perfect and look only at the present tense. "The landlord is willing." It would be a hardship and worse on the tenant, if the relevant date were any other than that of the hearing: it is to his advantage that the opportunity of accepting an offer of alternative accommodation should be open to the last moment, and it is inconceivable that the landlord should at the hearing be permitted to say that, though no longer willing, he had been willing at an earlier date, and therefore could validly oppose the application. Nor would it be reasonable to reduce the time within which the landlord should have the opportunity of finding and offering alternative accommodation. If the tenant complains that he has had too little time to consider its suitability, his grievance can be met by an appropriate adjournment. In ground (*d*), therefore, I find support, if it be needed, for the view that the word "intends" in ground (*f*) means "intends at "the date of the hearing."

Learned counsel for the appellants argued in the alternative that the relevant intention must be proved to exist at the moment when the landlord states in the proceedings that he opposes the tenant's application on ground (*f*), that is, presumably, when the proceedings are commenced by way of originating summons in the High Court, in the affidavit filed by him or on his behalf in opposition. But it did not appear to me that there was any reason to select this moment of time rather than any other in the course of the hearing before judgment except that fortuitously it would in the present case defeat the respondents. They also relied on the analogous provisions of Part I of the Act: so also did counsel for the respondents. I intend no disrespect to their careful arguments if I say that they cannot affect the conclusion that I reach upon a consideration of the relevant sections of Part II.

My Lords, in the courts below it was proper to consider at length the cases in which the quality of the requisite intention had been considered, and also those cases in which there had been obita dicta as to the relevant date. As to the former, I hope I have said enough in accepting the decision of Lord Asquith in *Cunliffe* v. *Goodman* [3] and not dissenting from the elaboration or explanation of it by the present Master of the Rolls. As to the latter, the point having been fully argued in the present case but not in those containing the dicta to which I have referred, your Lordships will not, I believe, think I should be justified in occupying time in discussing them.

It remains to consider an alternative argument on behalf of the appellants which was not, I think, dealt with by the Court of Appeal. It was to the effect that upon the true construction of section 30 a reconstruction or other work such as is specified in paragraph (*f*) is not intended within the meaning of, and does not fall within, the said paragraph, if the landlord's intention to carry out the work is conditional upon his obtaining possession of the premises for his own occupation, and the sole object of the work is to adapt the premises for the purposes of the business which he desires to carry on therein. It is clear that no such limitation of the scope of paragraph (*f*) is to be found in the paragraph itself. But it is said to be implicit in it, when read with paragraph (*g*). But there is, I think, no force in this argument. Paragraph (*g*) is available to the landlord whether or not he intends to carry out a work of demolition or reconstruction. There is no reason to deny to him the use of paragraph (*f*) if he can satisfy its conditions. I do not ignore that reliance was placed on a decision of the Privy Council in *McKenna* v. *Porter Motors Ltd.*,[4] but I am unable to get any help from a construction placed on another statute unless it establishes some principle or that statute is so closely connected with the statute under consideration that the legislature must be deemed to have legislated with a knowledge of that construction. The decision in *McKenna* v. *Porter Motors Ltd.*[4] satisfied neither condition.

In the result, the appeal must be dismissed with costs. That means that the application of the appellants for the grant of a new lease fails and must be dismissed. I think it right to mention this because the case has taken a curious course. The order of the Court of Appeal did not directly order that the application should be dismissed but, in effect, made the dismissal conditional upon the learned judge finding on further consideration that the intention of the respondents on April 23, 1956, possessed the necessary qualities of fixity and genuineness. The learned judge did so find and accordingly himself dismissed the application. But no further order was made by the Court of Appeal.

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[3] [1950] 2 K.B. 237.

[4] [1956] A.C. 688; [1956] 3 All E.R. 262.

LORD MORTON OF HENRYTON. My Lords, the appellants are tenants of Nos. 42–44, Darley Street, Bradford. They and their predecessors in title (an associated company) have held the premises since 1925 under a series of four leases for terms of eight, eight, five and eight years. The last of these leases expired on December 31, 1953. The tenancy was continued until December 31, 1954, by an order made under the Leasehold Property (Temporary Provisions) Act, 1951, and from January 1, 1955, the tenancy has been continued by section 24 (1) of the Landlord and Tenant Act, 1954.

The respondent company completed a purchase of the leasehold reversion in the premises, expectant on the determination of the appellants' tenancy, on March 1, 1954. On June 28, 1955, the appellants served on the respondent company a request for a new tenancy under sections 24 (1) (*b*) and 26 of the 1954 Act. In reply thereto the appellants received a notice in writing dated August 15, 1955, signed by Mr. Jones, the secretary and a director of the respondent company, purporting to be a notice given pursuant to section 26 (6) of that Act. The notice stated that the respondent company would oppose an application to the court for the grant of a new tenancy on the ground "that on "the termination of the current tenancy we intend to reconstruct "the premises comprised in the holding or a substantial part of "those premises or to carry out substantial work of construction "on the holding or part thereof and that we could not reasonably "do so without obtaining possession of the holding." The words quoted are taken from section 30 (1) (*f*) of the 1954 Act.

The subsequent history of the matter has been fully stated by my noble and learned friend on the Woolsack. As he has stated, it was proved that on April 23, 1956 (the fifth day of the hearing of this case by Danckwerts J.), the respondent company intended to carry out the works mentioned in the notice, but it was not proved that the company so intended at any earlier date.

The question for decision on this appeal is whether this intention was formed too late to enable the respondent company to oppose the application of the appellants for a new tenancy. Danckwerts J. held that this intention must be in existence when the notice of opposition is served, and granted to the appellants a new tenancy for 14 years at a rent of £3,000; but the Court of Appeal, by a majority (Lord Evershed M.R. dissenting), held that the intention need not be formed until the opposition by the landlord is being heard by the court. The result was that the appellants' application for a new lease was dismissed.

My Lords, I have not found it easy to answer the question just stated. The answer to it depends upon the true construction of the relevant provisions of the Landlord and Tenant Act, 1954, and in particular the following provisions:

Section 26 (6): "Within two months of the making of a "tenant's request for a new tenancy the landlord may give notice "to the tenant that he will oppose an application to the court "for the grant of a new tenancy, and any such notice shall state "on which of the grounds mentioned in section thirty of this "Act the landlord will oppose the application."

Section 30: "(1) The grounds on which a landlord may oppose "an application under subsection (1) of section twenty-four of "this Act are such of the following grounds as may be stated in "the landlord's notice . . . under subsection (6) of section twenty-"six thereof, that is to say:—(*a*) where under the current "tenancy the tenant has any obligations as respects the repair "and maintenance of the holding, that the tenant ought not to "be granted a new tenancy in view of the state of repair of the "holding, being a state resulting from the tenant's failure to "comply with the said obligations; (*b*) that the tenant ought not "to be granted a new tenancy in view of his persistent delay in "paying rent which has become due; (*c*) that the tenant ought "not to be granted a new tenancy in view of other substantial "breaches by him of his obligations under the current tenancy, "or for any other reason connected with the tenant's use or "management of the holding; (*d*) that the landlord has offered "and is willing to provide or secure the provision of alternative "accommodation for the tenant, that the terms on which the "alternative accommodation is available are reasonable having "regard to the terms of the current tenancy and to all other "relevant circumstances, and that the accommodation and the "time at which it will be available are suitable for the tenant's "requirements (including the requirement to preserve goodwill) "having regard to the nature and class of his business and to "the situation and extent of, and facilities afforded by, the "holding; . . . (*f*) that on the termination of the current "tenancy the landlord intends to demolish or reconstruct the "premises comprised in the holding or a substantial part of those "premises or to carry out substantial work of construction on the "holding or part thereof and that he could not reasonably do so "without obtaining possession of the holding; (*g*) subject as "hereinafter provided, that on the termination of the current "tenancy the landlord intends to occupy the holding for the "purposes, or partly for the purposes, of a business to be carried "on by him therein, or as his residence.

"(2) The landlord shall not be entitled to oppose an application on the ground specified in paragraph (*g*) of the last foregoing subsection if the interest of the landlord . . . was purchased or created after the beginning of the period of five years "which ends with the termination of the current tenancy . . ."

I omit paragraph (*e*) because neither party relied upon it in this House.

Section 31 (1): "If the landlord opposes an application under "subsection (1) of section twenty-four of this Act on grounds "on which he is entitled to oppose it in accordance with the last "foregoing section and establishes any of those grounds to the "satisfaction of the court, the court shall not make an order for "the grant of a new tenancy."

Counsel for the appellants point out that a landlord can only oppose the tenant's application for a new lease if he brings himself within the terms of section 30 (1), and their argument continues on the following lines. Taking paragraph (*f*) as an example, two requirements are imposed on the landlord by section 30 (1). First he must assert the facts set out in paragraph (*f*) and, secondly, this assertion must be made in his notice of opposition. Having asserted these facts, the landlord must establish, at the hearing of the application, that the assertion was true, that is, that when he delivered the notice of opposition the landlord intended to carry out the works mentioned in paragraph (*f*) on the termination of the current tenancy. It is now common ground that in the present case the landlord failed to establish that he had such an intention when he delivered the notice of opposition. Therefore the opposition of the landlord failed, and the Court of Appeal wrongly dismissed the tenants' application for a new tenancy.

H. L. (E.)
1958

Betty's Cafés Ltd.
v.
Phillips Furnishing Stores Ltd.

Lord Morton of Henryton.

In support of the argument just stated, counsel for the appellants point to the terms of paragraphs (*a*), (*b*), (*c*) and (*d*) of section 30 (1). They submit that the " state of repair " mentioned in (*a*), the " persistent delay " mentioned in (*b*), and the " substantial breaches " mentioned in (*c*) all refer to facts existing at the date of the notice. They further submit that in paragraph (*d*) the words " has offered " must refer to an offer made before the notice has been delivered, and in the same paragraph the words in the present tense " is willing," " is available " and " are suitable " must refer to the state of affairs at the date of the notice. This being so, they say, the words " the landlord " intends," in paragraph (*f*), must also refer to the state of affairs at the date of the notice, since it would be strange indeed if in paragraph (*f*) the legislature intended to refer to any point of time other than the point of time so clearly indicated in the earlier paragraphs.

My Lords, the line of argument which I have tried to summarize undoubtedly has its attractions, but I have reached the conclusion that it cannot prevail, if one considers section 30 in the light of section 26 (6) and section 31 (1) already quoted. Section 26 (6) provides that the landlord's notice of opposition " shall state on which of the grounds mentioned in section thirty " of this Act the landlord *will oppose* the application." The words " will oppose " must surely refer to some date *after* the delivery of the notice in which the landlord states the ground on which he " will oppose " the tenant's application. And, in my view, that date can only be the date when the opposition of the landlord is heard by the High Court or the county court, as the case may be.

I now turn to section 30 (1) and I shall first consider a case where the landlord selects paragraph (*f*) as the ground on which he will oppose the tenant's application. That is the present case, and I shall for the moment disregard the other paragraphs in section 30 (1). Looking only at paragraph (*f*), and bearing in mind what the landlord is to state under section 26 (6), it would seem that when the landlord delivers his notice he is not saying: " I give you notice that I intend to reconstruct the premises." He is saying: " I give you notice that I will oppose your " application on the ground that I intend to reconstruct the " premises," which is a very different statement. The former is a statement that an intention to reconstruct exists at the time when the notice is given. The latter is a statement that at a future date the landlord will allege, and endeavour to prove, that an intention to reconstruct is then in existence. Later, when the hearing takes place, the landlord says to the court: "I now "oppose the application of the tenant on the ground that I "intend to reconstruct the premises and that I could not reasonably do so without obtaining possession of the holding." If the landlord establishes that his intention exists at that date, and that the work could not reasonably be carried out without obtaining possession of the holding, section 31 (1) forbids the court to make an order for the grant of a new tenancy. There was much discussion in the course of the argument as to the nature of the "intention" which must exist at the relevant date, but ultimately counsel on both sides agreed that the landlord must prove that he has definitely decided to carry out the work, and that this decision has a reasonable prospect of being carried into effect. I would accept this definition, which is entirely in accordance with the words of Lord Asquith already quoted by my noble and learned friend on the Woolsack.

The observations which I have just made on paragraph (*f*) apply equally to the use of the word "intends" in paragraph (*g*), and if these paragraphs had stood alone in section 30 (1), I should have had no doubt that the appeal must fail. But section 30 (1) must be read as a whole, and I now turn to paragraphs (*a*) to (*d*) inclusive. I shall first read paragraph (*a*) in the light of section 26 (6). So read, the effect of paragraph (*a*) is as follows: "I give you notice that I will oppose your application "on the ground that you ought not to be granted a new tenancy "in view of the state of repair of the holding, being a state "resulting from your failure to comply with your obligations."

I cannot imagine a landlord relying on this ground unless the premises were in disrepair at the date of the notice, and I think that at the hearing, in deciding whether the tenant ought or ought not to be granted a new tenancy, the court would have regard both to the state of repair at the date of the notice and to the state of repair at the date of the hearing. A similar situation arises in cases under paragraphs (*b*) and (*c*) of section 30 (1). The court would consider, at the hearing, whether there has been persistent delay in paying rent, or other substantial breaches of obligation by the tenant, at the date of the notice, and would also consider the state of affairs at the date of the hearing. Again, in a case under paragraph (*d*), the court would consider the state of affairs at each of the dates already mentioned. Thus in each of these four paragraphs I find words which are clearly referable to the date of the notice of opposition.

I feel, my Lords, that this fact lends considerable support to the views expressed by the Master of the Rolls, and Danckwerts J. and I think that the presence of paragraphs (*a*) to (*d*) inclusive in section 30 (1) throws some doubt upon the meaning of the word " intends " in paragraph (*f*). In the end, however, I have come to the conclusion that the decision of the majority of the Court of Appeal is correct. In paragraphs (*f*) and (*g*) there are no words which are plainly referable to the date of the notice of opposition and, for the reasons already given, I think that the more natural interpretation of the word " intends " in paragraph (*f*) is that it is referable only to the time when the opposition of the landlord is heard by the court. If a doubt exists on the point, it is right to have regard to the practical considerations mentioned by Romer L.J. in the passages in his judgment which I shall now quote[5]: " Section 31 (1) shows, in my opinion, " beyond question that the intention must exist at the hearing; " for it would be nihil ad rem for a landlord to establish to the " satisfaction of the court that he had intended some weeks or " months previously to demolish or reconstruct on the termination of the tenancy if, in fact, he had abandoned that intention " in the interval. But the additional requirement that an earlier " intention, in the strict sense of the word, must also be established cannot be clearly derived, in my judgment, from the " statutory language used which, if it imposes the requirement " at all, does so in an equivocal and ambiguous manner. " Accordingly, it is permissible to inquire whether the requirement would, on the one hand, be of advantage to the tenant " and, on the other hand, would or might result in hardship or " inconvenience to the landlord; for if it would be a disadvantage " to the landlord without securing any corresponding benefit to " the tenant, it is surely a legitimate inference that the legislature did not intend to impose it."

The learned Lord Justice then embarked on the inquiry just mentioned and concluded, for reasons which I accept, that a requirement that the " intention " must exist at the date of the notice of opposition was unnecessary for the protection of a tenant and would or might impose hardship on a landlord. As to the reason for the requirement, in section 26 (6), that the landlord must state, in his notice of opposition, on which of the grounds mentioned in section 30 he intends to rely, Romer L.J. said[6]: " The matter will ultimately come before the court and it is

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[5] [1957] Ch. 67, 91; [1957] 1 All E.R. 1.

[6] [1957] Ch. 67, 93.

"obviously right that the tenant should know in advance what is "the case that he will have to meet at the hearing. It is, in my "judgment, the object of the counter-notice that the tenant "should be given this information, but, in my opinion, the "counter-notice has no further or other object. It is, I think, "intended to be in the nature of a pleading and its function, as "in the case of all pleadings, is to prevent the other party to the "issue from being taken by surprise when the matter comes "before the judge. Why the interests of justice should further "require that the landlord's intention must be shown to have "been a definite and settled intention at the time when the "counter-notice is served, or why the tenant should be entitled "to a new tenancy unless such an intention can be established, I "find, for my part, difficult to comprehend."

My Lords, I would gratefully adopt these observations, and they confirm me in my view that the word "intends" in paragraph (*f*) should be construed as referable only to the date when the opposition of the landlord is heard, notwithstanding the doubts which are created by the language of paragraphs (*a*) to (*d*) inclusive.

In the course of the argument reference was made to the provisions of Part I of the 1954 Act, but I have been unable to derive any assistance from these provisions. Other dates were suggested as being possible dates on which intention to reconstruct must be formed, but I can find no warrant in the Act for selecting any of these alternative dates. I think that if the intention need not exist at the date when the notice of opposition is served, it need not exist at any other time before the hearing of the opposition by the landlords.

A further argument submitted on behalf of the appellants was stated by Mr. Russell somewhat as follows: Even if the requirements of the Act are satisfied by an "intention" formed just before judgment is given, these requirements are not satisfied if the landlord's *only* intention is to carry out works necessary to enable him to occupy the premises. Counsel referred to certain cases bearing upon this matter, in particular *Atkinson* v. *Bettison*[7] and *Fisher* v. *Taylors Furnishing Stores Ltd.*[8] I need only say that I can find no ground for this submission in the Act of 1954 and I would adopt the language of Parker L.J. in the latter case.[9] After referring to the relevant sections of the

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[7] [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340.

[8] [1956] 2 Q.B. 78; [1956] 2 All E.R. 78.

[9] [1956] 2 Q.B. 78, 91–92.

Act of 1954, Parker L.J. continued as follows[9]: "From the "scheme of the Act as there laid down I should have thought "that it was clear, apart from authority, that if any of those "grounds of objection is established, the tenant's application for "a new lease must fail. Each ground is entirely separate and "independent, and each, if proved, entitles the landlord to "succeed. Thus, if ground (*f*) is proved to the satisfaction of "the court, it matters not to what use the landlord ultimately "intends to put the holding. He may intend to let it when the "work is done to a third party. He may intend ultimately to "occupy it himself for his own business; or he may not have "made up his mind at all. To suggest that, if his intention is "ultimately to occupy it himself and he cannot by reason of "subsection (2) of section 30 rely on ground (*g*), he is thereby "debarred from relying on ground (*f*), is to apply a proviso to "the operation of ground (*f*) which is not there and for which "there is no warrant. Of course, if he finds himself debarred "from relying on ground (*g*) and is forced to rely on ground (*f*), "his task will not be an easy one; it will at once be suspected "that his alleged intention is not genuine, and that it is merely "put forward to circumvent his inability to rely on ground (*g*). "But assuming that he satisfies the court that the intention is "genuine I can see no reason why he should be debarred from "relying on ground (*f*)."

The result is that, in my view, the appellants are not entitled to the grant of a new tenancy and the question of the length of the term which should be granted does not arise; but as the members of the Court of Appeal were unanimous in thinking that the term should be five years, in place of the term of 14 years granted by Danckwerts J., I desire to say that I prefer the view of the Court of Appeal. It is true that under section 33, in default of agreement between the parties, the new tenancy is to be "such a tenancy as may be determined by the court to "be reasonable in all the circumstances, being . . . a tenancy "for a term not exceeding 14 years." Thus the learned judge had a discretion; but I cannot help feeling that in granting a term of the maximum length, he may have overlooked one consideration which seems to me of great importance. In all cases, except a case coming within subsection (2) of section 30 (already quoted), if a landlord proves at the hearing the ground of objection set out in paragraph 30 (1) (*g*), namely, that he intends to

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[9] [1956] 2 Q.B. 78, 91–92.

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occupy the holding for the purposes of a business to be carried on by him therein, the court must refuse to grant a new tenancy. In the present case I think it is clear that the landlords could have proved this fact. The only reason why they could not rely on paragraph (*g*) was because they came within subsection (2) of section 30, and it is to be observed that the Act, in these circumstances, imposes a bar for a period which cannot exceed five years. In the present case the bar would only have lasted till March 1, 1959. I do not suggest that these facts compel the court to any particular conclusion as to the length of the term to be granted; but I think that section 30 (2) gives an indication of the policy of the Act in cases coming within paragraph (*g*) of section 30 (1).

I agree that this appeal should be dismissed.

Lord Keith of Avonholm. My Lords, in this difficult case, which, before coming to this House, has given rise to an even conflict of judicial opinion, I find myself in general agreement with the judgment of the learned Master of the Rolls. He has expressed his reasons so fully and so clearly that I find it unnecessary to embark on a detailed examination of the Act under consideration and will confine myself to a few general observations.

I should have thought that when Parliament provided for the notices to be given by the landlord under section 25 and section 26 of the Act it contemplated that the grounds on which the landlord has to state that he would or will oppose an application to the court for a new tenancy would be in existence at the time of the notice. This, I should have thought, was clear where the notice was given under section 25, for I cannot understand a landlord, who wishes to terminate a tenancy, being thought to state a ground of opposition to a possible application for a new tenancy that did not exist at the time of his notice. The prescribed form of notice under the Landlord and Tenant (Notices) Regulations, 1957 (S.I. 1957, No. 1157), carries, I think, the same inference. I am not sure that sufficient attention has been paid to this aspect of the case. When I turn to the grounds themselves, set out in section 30 (1), I find that grounds (*a*) to (*d*) are grounds which have their origin in the past. These must, I think, be assumed to be live grounds at the date of the notice. Without examining various situations that might arise under these heads, because no case under them is now before us, it may be, though it is not necessary to express any opinion on the point, that the court might take account of the fact that the tenant had purged past breaches of his contract of tenancy under heads (*a*) to (*c*) by the time the case came into court. Ground (*d*) raises a somewhat different point, for it speaks both in the past and in the present. Here I would be prepared to read "is willing" as involving an element of continuing willingness. It must mean, I think, is willing at the time of the notice and at the time his opposition commences. What is to happen if the alternative accommodation offered thereafter disappears is a problem that may some day have to be considered, for a tenant may well think that he has good reason for resisting the offer on the ground that the accommodation offered is not reasonably suitable.

Ground (*f*), as also ground (*g*), speaks wholly in the present, "the landlord intends." As under (*d*), I think this means that he intends at the time of the notice, and that he will intend at the commencement of his opposition. But as this is an intention with regard to something which is to happen in the future, namely, on the termination of the current tenancy, I think he must continue to intend throughout the hearing. If he abandoned his intention while the court was seised of the case, it would be a clear negation of what the statute meant, that he should be given possession because he had an intention when he gave the notice and when proceedings commenced. In effect he must, I think, be taken to say: "I have intended, I do intend and I will "continue to intend," and the court must believe him. It may be said that if continuing intention is required, last-minute intention achieves the same result. Even if it did, that is not, I think, what the statute says. The landlord is entitled to oppose under section 30 (1) only if the factual ground stated in the notice given under section 26 (6) was then true. The tenant is entitled to know betimes the alleged reason for the landlord's opposition, to enable him to judge of its truth and make his arrangements accordingly. A termination of his tenancy because of a last-minute intention of the landlord accepted by the court as genuine may put him to no end of inconvenience and disturbance of his business. On the other hand, if the court thinks the intention, though belated, should receive consideration, it could grant a short tenancy which the landlord could give notice to terminate because of his intention, without any grave hardship to the landlord.

Reference has been made to the hardship that might arise to a landlord if he had to make up his mind within two months of a tenant's request for a new tenancy in a matter of demolition or substantial reconstruction of his premises. But I find it somewhat unreal to imagine a landlord, spurred by the request of a

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tenant for a new tenancy, suddenly to bethink himself of a scheme of reconstructing or substantially altering his premises, and if he has been contemplating such a project and is unable to make up his mind, for one reason or another, within the statutory period, the statute contemplates, I think, that the tenant should not be faced with this ground of opposition. As I have said, if the landlord has perfected his plans and intentions before a new lease has been granted, but too late to give due notice, he may adduce that as a ground for curtailing the length of the new tenancy. Further, the point has no validity where the landlord gives notice to terminate the tenancy and intimates reliance on an intention under head (*f*) in the event of the tenant applying for a new tenancy.

The learned Master of the Rolls, while he considers the date of the landlord's notice as the relevant date, says that alternatively the relevant date is the date when parties first join issue, here the lodging of the landlord's affidavit. I would not dissent from this as an alternative ground of judgment, though I prefer the view that the intention must exist at both dates.

I would allow the appeal.

Lord Somervell of Harrow. My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack and desire to add only a few observations.

The sections dealing with applications by the tenant and opposition by the landlord have already been cited. The notice under section 26 (6) in all cases, I think, is for the purpose of telling the tenant the case which he will have to meet if the matter comes to court. It is, as Romer L.J. said, analogous to a pleading. The landlord may fail. That would not mean that the notice had been invalid as a document entitling him to appear.

In all the cases under section 30 the court must, in my opinion, consider the points raised as at the conclusion of the cases on each side. Although, for example, a notice based on paragraph 30 (1) (*b*) would not be given unless there had been past delay in paying rent, events between the notice and the hearing would be relevant to the decision whether the court ought to grant the tenancy. The tenant may after the notice has been given have improved or aggravated his position as a payer. The court would have to consider as at the time of the hearing whether he had "persistently delayed in paying his rent."

When one comes to paragraphs (*f*) and (*g*) the intention must be established to the satisfaction of the court when the order

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falls to be made. The previous history may be relevant in considering whether there is an intention within the statute. If the appellant is right, a landlord is precluded from giving a notice if at the time of the notice demolition or reconstruction is a possibility or probability but not an intention. A landlord may have instructed an architect or surveyor who has not by the end of the two months completed his plans and obtained an estimate. I can find no words in the Act or any principle which would exclude a landlord on that state of facts from giving a valid notice. The estimate may be satisfactory and the court fully satisfied of his intention. If the estimate is higher than he likes, he can withdraw his opposition.

I also agree with Romer L.J. that if the statutory language imposes the requirement for which the appellant contends, it does so in "an equivocal and ambiguous manner." The provisions under consideration are cutting down the contractual rights of the landlord and an equivocal and ambiguous manner is not sufficient on this and it may well be on other grounds.

An argument was based on the different wording of Part I of the Act dealing with residential tenants. An Act must no doubt be construed as a whole, but it would be unfortunate if landlords of business premises could only discover their rights and obligations by drawing inferences from complicated provisions dealing with a different subject-matter. The argument was in part based on the use of the word "proposes" in section 4 (3) (*b*), the suggestion being that proposals were less formal than intentions. I doubt this. In the matrimonial field and in others a proposal is not made until an "intender" has reached the head of the "valley of decision."

The word "intends" is to be found in section 30 (1) (*f*). I doubt whether one assists the tribunal of fact by expanding into a paragraph what Parliament has stated in a word which falls, of course, to be applied in its context. If one starts laying down other words, they may well cause difficulty in the varied circumstances which may arise.

On the second point I agree with what Parker L.J. said in *Fisher* v. *Taylors Furnishing Stores Ltd.*,[10] and would not wish to add to it.

I would dismiss the appeal.

LORD DENNING. My Lords, on August 15, 1955, the landlords, Phillips Furnishing Stores Ltd., gave a notice to the tenants

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[10] [1956] 2 Q.B. 78, 91.

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opposing the grant of a new tenancy. The notice was in accordance with the statute and said this: "The grounds on which we shall "oppose any application which you may make to the court for "the grant of a new tenancy . . . are that on the termination of "the current tenancy *we intend to reconstruct the premises* . . ." It was signed "A. Jones for and on behalf of Phillips Furnishing "Stores Ltd." Mr. Jones was the secretary of the company and a director of it.

I regard that notice as a clear statement that at that time—the time of giving the notice—the company had formed the intention to reconstruct the premises. It meant: "We intend to reconstruct the premises at the end of your tenancy." It did not mean: "If you make an application to the court, then, by the "time it is heard, we *will* intend to reconstruct." It is a misuse of the English language for a man to say: "I *will* intend to do" so and so. He says: "I intend to do it." Intention is a present state of mind denoting what it is his purpose to do in the future. That is the way in which the Master of the Rolls interpreted this notice and I entirely agree with him about it.

This interpretation is borne out by a reference to the other grounds which under the statute may be stated in a notice of opposition. If a landlord opposes on the ground that: "I have "offered you alternative accommodation and am willing to "provide it," he clearly means that *in the past*, at some time before the notice, he *has offered* alternative accommodation, and that *in the present*, at the time of giving the notice, he *is willing* to provide it. If he opposes the new lease on the ground of "your persistent delay in paying rent," he means the tenant's delay in the *past*, before the giving of the notice, and not some hypothetical delay in the future.

Such being the true interpretation of these notices, I am of opinion that they must be given honestly and truthfully. They are not to be regarded merely as pleadings preparatory to a trial—in which parties, I regret to say, sometimes deny the truth, or refuse to admit it, if it suits their plan of campaign. These notices are intended to be acted upon before there is a trial at all. On the receipt of such a notice, the tenant has to decide his course of action—for instance, whether to accept the alternative accommodation that is offered, or whether to accept the landlord's word that he intends to occupy the premises himself, or as the case may be. In every case he has to decide whether to apply for a new lease or not. It would be deplorable if a landlord could be allowed to get an advantage by misrepresenting his state of mind

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or any other fact. Suppose he said in his notice: "I intend to "reconstruct the premises," or "I intend to occupy for the purposes of my own business," when he, in fact, had no such intention at all. On the faith of such a statement, the tenant might be induced to abstain from applying to the court for a new tenancy, because he would think it no use to do so. He would know that he would have to pay the costs if he lost. Just imagine the tenant's consternation if at the end of the tenancy, after he had left, the landlord did not reconstruct the premises or occupy them himself, but straightway let in someone else. Would the tenant have no redress? I should have thought it clear that the notice would be bad—voidable—liable to be set aside for fraudulent misrepresentation; see *Lazarus Estates Ltd.* v. *Beasley.*[11] If it was avoided, the original tenancy would continue. The landlord would get no advantage from his misrepresentation—which is as it ought to be. If it was too late to avoid the notice, the landlord would be liable at common law in damages for fraud: just as he would be under section 55 if the misrepresentation was made to the court.

Provided, however, that the notice is a good and honest notice when it is given, then it is clear to my mind that the ground stated therein must be established to exist at the time of the hearing. Suppose a landlord had been willing on the giving of the notice to provide alternative accommodation, but he was not willing at the time of the hearing; or suppose he had the intention, at the giving of the notice, to reconstruct the premises, but had changed his mind by the time of the hearing. He clearly could not resist a new lease. To succeed he must satisfy the trial judge that, at the time when the court comes to make its order, he is *then* willing to provide alternative accommodation, or *then* intends to reconstruct, or as the case may be. An interesting parallel can be found under the Rent Acts; see *Kimpson* v. *Markham,*[12] *Benninga (Mitcham) Ltd.* v. *Bijstra,*[13] *R. F. Fuggle Ltd.* v. *Gadsden.*[14]

In short, it comes to this: the landlord must *honestly and truthfully* state his ground in his notice and he must establish it as *existing* at the time of the hearing.

Apply this to the present case: the landlords did establish to the satisfaction of the judge, before he made his order, that at the time of the hearing they intended to reconstruct the premises at the end of the tenancy. But the tenants assert—and it was the main burden of their complaint before your Lordships—that the landlords had not that intention at the time when they gave their notice. What is the result of this? If the notice had been a dishonest notice in which the landlords had fraudulently misrepresented their intention—or, I would add, if there had been a material misrepresentation in it—I should have thought it would be a bad notice. But no such suggestion was made at any stage of the proceedings, and I think I can see why. Much of the trial was occupied with the question whether the proposed work was " substantial " and whether there was a firm " intention " to do it. In the course of this inquiry, the judge held that " the intention of the company can only be discovered from " the acts of the board of directors as recorded in the minutes " of the company," and, as no resolution was passed until April 23, 1956, he held that the company had not established its intention before that date. This finding was not challenged before your Lordships, but I may perhaps remark that it has since been held that a company can form an intention without necessarily calling a board meeting; see *H. L. Bolton Engineering Co. Ltd.* v. *T. J. Graham & Sons Ltd.*[15] It is the absence of a board meeting that has led to an apparent paradox: The company did not have the intention it professed at the date of the notice, but nevertheless its statement of it in the notice was not dishonest or untrue. The explanation is this: Mr. Jones, the secretary and a director, gave the notice in good faith. At the time the notice was given, there was no resolution of the board of directors giving Mr. Jones authority to sign the notice and he disclaimed any right to bind the company without a directors' meeting. But he, no doubt, assumed—quite rightly as it turned out—that the company would ratify his action. Many an agent has done as much before to protect his principal's interests and no one has ever suggested that there is anything wrong in it. The company ratified Mr. Jones's action when it, by its solicitors, filed in the court an affidavit in answer to the tenants' application. In this affidavit the acting secretary swore on oath that he was authorized by the company to make it on its behalf and stated that the company opposed a new tenancy on the ground stated in its notice of opposition. No one can, in these proceedings, dispute the authority of the company's solicitors to file this answer on the

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[11] [1956] 1 Q.B. 702; [1956] 1 All E.R. 341.

[12] [1921] 2 K.B. 157; 37 T.L.R. 342.

[13] [1946] K.B. 58; 61 T.L.R. 519; [1945] 2 All E.R. 433.

[14] [1948] 2 K.B. 236, 243; 64 T.L.R. 364; [1948] 2 All E.R. 160.

[15] [1957] 1 Q.B. 159; [1956] 3 All E.R. 624; (H.L.) [1957] 1 W.L.R. 454.

company's behalf. It was a clear ratification of Mr. Jones's action at a time long before the tenants had any idea that it had not been authorized. The notice thereupon became just as good as if it had been previously authorized: see *Ancona* v. *Marks*.[16]

It will be seen that I have gone a long way with the Master of the Rolls. His mind recoiled at the thought that a landlord, by making an untrue statement about his intentions, could successfully resist a new lease. The Master of the Rolls would not allow the landlord to get any advantage by an untrue notice. Nor would I. But in this particular case I do not regard the landlords' notice as untrue. Once it was ratified by the company it became true from the beginning.

On the second point, I agree that it is covered by *Fisher* v. *Taylors Furnishing Stores*,[17] which will now have the support of this House. In that case the Court of Appeal virtually overruled one of the grounds of the decision in *Atkinson* v. *Bettison*,[18] leaving that decision to rest on its other ground—a course which I think it was right to take, on being completely satisfied that the first ground was wrong.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Ward, Bowie & Co. for Booth, Wade, Lomas-Walker & Co., Leeds; Clifford-Turner & Co.*

F. C.

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[16] (1862) 7 H. & N. 686.

[17] [1956] 2 Q.B. 78.

[18] [1955] 1 W.L.R. 1127.

EWA PERKOWSKI . . . . . APPELLANT;

AND

WELLINGTON CORPORATION . . . RESPONDENTS.

J. C.*
1958
Oct. 14.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Licensor and Licensee—Licensee—Duty of occupier—Fatal dive into shallow water—No concealed danger—Local authority occupier of diving board—Deceased a licensee—No general duty of care.

Licensor and Licensee—Invitee or licensee—Duty of occupier—Distinction.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD DENNING.

J. C.

1958

PERKOWSKI
v.
WELLINGTON
CORPORATION.

Court of Appeal—Argument not raised below—Discretion of appellate court to entertain—New Zealand.
New Zealand—Negligence.

The appellant's husband died as a result of injuries suffered when he dived at low tide from a spring-board into shallow water. The board, which was on a platform at the end of a wooden duck-walk, had been erected some years earlier by the respondent corporation at the request of a swimming club to replace a previous board. The platform was on a concrete support set in the harbour bed (which was vested in the Marine Department). On a claim for damages brought by the appellant against the corporation under the Deaths by Accident Compensation Act, 1952, on the basis that the deceased was a licensee, the jury found, inter alia, that the corporation were the occupiers of the premises comprising the spring-board —which was not challenged—and that the spring-board did not constitute a concealed danger at low tide:—

Held, that as a licensee the deceased must take the land as he found it, and the corporation as occupiers owed him no general duty of care other than to warn him against concealed dangers in the nature of a trap—which the jury's answer negatived. There could be no logic in drawing a distinction between the state of the land when the occupier went into occupation and its state when changes had been made by him. Further, the fact that the concealed danger was that of injury outside the occupied area, whether in the sea or on a highway or in adjacent property, on principle would not seem to prevent the application of the rule.

Latham v. *R. Johnson & Nephew Ltd.* [1913] 1 K.B. 398; 29 T.L.R. 124 applied.

Slater v. *Clay Cross Co. Ltd.* [1956] 2 Q.B. 264; [1956] 2 All E.R. 625 distinguished.

Observations on raising, in appellate courts, points of law not taken in the courts below.

The appellant, not having taken at the trial the point that the deceased was an invitee to whom the corporation owed a general duty of care, could not be permitted to take it on appeal.

Dicta of Lord Birkenhead L.C. in *North Staffordshire Railway Co.* v. *Edge* [1920] A.C. 254 at 263; 36 T.L.R. 115, and *Connecticut Fire Insurance Co.* v. *Kavanagh* [1892] A.C. 473; 8 T.L.R. 752 considered.

Judgment of the Court of Appeal of New Zealand [1957] N.Z.L.R. 39 affirmed.

APPEAL (No. 9 of 1958), by special leave in forma pauperis, from a judgment of the Court of Appeal of New Zealand (Barrowclough C.J., Stanton and Adams JJ.) (October 12, 1956) dismissing the present appellant's appeal from a judgment of the Supreme Court of New Zealand (Hutchinson J. with a jury) (November 17, 1955) whereby, following argument after verdict on the findings of the jury, judgment was entered for the present respondents, the Corporation of Wellington.

The following facts are taken from the judgment of the Judicial Committee: The plaintiff's husband died on January 10, 1954, as a result of injuries suffered on the day before when he dived from a spring-board at Worser Bay in the City of Wellington. The claim was brought under the Deaths by Accident Compensation Act, 1952.

The jury were asked first whether the defendant corporation was the occupier of the premises comprising the spring-board. The defendants were admittedly occupiers of the land above high-water mark and certain off-shore rocks, but submitted that they were not occupiers of the spring-board. The board was on a platform at the end of a wooden duck-walk, the platform being on a concrete support set in the harbour bed. The defendants relied on this and also on the fact that they had put up the board at the request of a swimming club. The jury found that the defendants were the occupiers of the premises comprising the spring-board and neither side now challenged that finding. The deceased had bathed in Worser Bay and dived from the board on a number of previous occasions. The plaintiff put her case on the basis that the deceased was a licensee. The judge accepted this and so directed the jury. No exception was taken by counsel to that. It was conceded that if the board constituted a concealed danger the defendants had knowledge of it.

The jury were asked as question 1 (2) whether the spring-board constituted a concealed danger at low tide? They answered, No.

1958. July 10, 14, 15, 16 and 17. *B. MacKenna Q.C.*, *J. G. Le Quesne* and *Robin Cooke* for the appellant. At high tide there were about six feet of water below the diving board as against about two feet at low water, and there are two undisputed facts: (i) the respondent corporation erected the diving board, and (ii) they put up no warning notice and erected no tide-gauge. The jury found that this was an obvious danger. The basis of the view of the New Zealand courts was that the corporation and the deceased stood to each other in the relation of licensor and licensee, and that the corporation, although it had erected the board, had no other duty than that owed by a licensor to a licensee—which was only to warn against dangers which would not have been obvious to him if he took reasonable care. It is sought to meet that view on the following three grounds:

(1) Apart from any duty which they owed him as occupiers the corporation owed an independent duty arising from their actions as erectors of the board. In erecting it for the use of the public it was their duty to take reasonable care for the safety of the public. The jury were entitled to find that they had committed a breach of this duty by erecting a board in a place where there were only two feet of water at low tide without providing either a tide-gauge or a warning notice. (2) Even if the duty owed to the deceased by the corporation as occupiers was that of licensor to licensee, and even if they owed him no independent duty as erectors of the board, it was their duty as licensors to take reasonable care for his safety in respect of dangers known to them but not known to or appreciated by him, and they failed to perform this duty. That proposition can be argued to be inconsistent with earlier authority but supported by some more recent cases in the Court of Appeal in England. (3) Lastly, as a member of the public using as of right the facility provided for the public by the local authority, the deceased had a higher status than that of a mere licensee. The local authority owed him a duty to take reasonable care for his safety. The jury found that the local authority failed to take that care.

On the first question (supra), it is perhaps a point for consideration whether the defendant could owe a duty in cases where the plaintiff could have avoided the danger by the exercise of reasonable care for his own safety. It is submitted that the defendant could owe a duty in that case. Three kinds of cases are to be distinguished: (a) Where the danger is so obvious that no duty of care was imposed on the defendant. (b) At the other extreme, there may be a danger so little obvious that it would not be perceived by a person exercising care for his own safety. In that case there is a duty. (c) There is, it is submitted, an intermediate class of danger which may be sufficiently obvious to be perceived by a careful person but not so obvious that others less careful would perceive and appreciate it. If there is a real possibility that people may fail to appreciate the danger, and if the consequences of the failure would be serious, and precautions to safeguard against risk can be taken easily and would normally be taken by a person who had created the danger, the failure to do so is negligence. It is a question of degree, and the jury is entitled to take into account the realness of the possibilities.

In considering whether there is any special feature of the law relating to occupiers which precludes the appellant from recovering—and assuming that the relationship between the deceased and the corporation was that of licensee and licensor—the question, on that assumption, is whether the special rules extend to all dangers which the licensee may meet on the licensor's premises, or is the scope of the special rules more restricted? There is authority for the view that the field occupied by the special rules is a restricted one, and that it does not extend to dangers created by the occupier's negligent operations on the land. At least in respect of operations current at the time when the licensee is on the land the occupier owes him the ordinary duty of care. The case is no different where the occupier's operations have ceased before the licensee enters leaving in existence a continuing state of danger. The occupier is liable on the ordinary principle of negligence in respect of any dangers which are the result of his own negligent operations.

There is an obvious difference in the measure of the duty between the case of a licensee on privately-owned land and a member of the public using facilities provided by a public authority. There is authority to show that under the general rule a duty of care can exist even though there intervenes between the defendant's negligence and the accident some want of care either of the plaintiff or a third person which contributed to cause the accident. Other cases show that the defendant is none the less liable for the negligent operations because he may also be the occupier of the land where the accident happened. And others show that a local authority does not stand in a privileged position.

It was with *London Passenger Transport Board* v. *Upson*[1] in mind that the intermediate class of cases was put forward (supra). *Riden* v. *A. C. Billings & Sons Ltd.*[2] gives the appellant here some help on the proposition that the duty of care can exist even though the plaintiff could by the exercise of reasonable care have avoided the danger. [Reference was also made to *Grant* v. *Sun Shipping Co. Ltd.*[3] and *Miller* v. *South of Scotland Electricity Board.*[4]] In *Slater* v. *Clay Cross Co. Ltd.*[5] Denning L.J. said: "Mr. Elwes stressed the fact that the plaintiff was "only a licensee and urged that this was of special significance. "I do not think so. . . . The classic distinction was that the

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[1] [1949] A.C. 155, 175; 65 T.L.R. 9; [1949] 1 All E.R. 60.

[2] [1957] 1 Q.B. 46; [1956] 3 All E.R. 357.

[3] [1948] A.C. 549; [1948] 2 All E.R. 238.

[4] Unreported, H. of L., July 3, 1958.

[5] [1956] 2 Q.B. 264, 269; [1956] 2 All E.R. 625.

"invitor was liable for unusual dangers of which he knew or "ought to know, whereas the licensor was only liable for con- "cealed dangers of which he actually knew. This distinction has "now been reduced to vanishing point." There is no difference between an operation which is current and one which is past— the occupier is liable for his past negligence in respect of an operation which has been completed. In *Riden's* case [6] things were done *to* the land as distinct from *on* the land, and yet the licensee was held entitled to recover. [Reference was also made to *Slade* v. *Battersea and Putney Hospital Management Committee* [7] and *Dunster* v. *Abbott*.[8]] There are also two Australian cases on the first point: *Perth Corporation* v. *Watson* [9] and *Thompson* v. *Bankstown Corporation*.[10]

With regard to question (2) (supra), it is submitted that even if the only duty was that of occupier to licensee, the appellant is still entitled to recover even though the jury found that the tide-gauge and warning notice ought to have been there; and for that purpose only the passage of Denning L.J. in *Slater's* case [11] can be cited.

As to point (3) (supra), it was held in *Plank* v. *Stirling Magistrates* [12] that the local authority was liable in damages to a young child who was injured by falling from a chute erected by the local authority in a playground in a public park on the ground that the child was an invitee and the danger was an unusual one of which the authority ought to have known. A higher duty was owed to the deceased here than that of licensor to licensee. It is a duty of reasonable care and safety. That duty is owing to him either if he is regarded as an invitee or as entitled to reasonable care. The right question was put to the jury in this case if the duty is the higher duty—whether reasonable care was taken—and they answered it against the corporation. The reasoning in *South Australian Co.* v. *Richardson* [13] supports that of Lord Mackintosh in *Plank's* case,[14] whose view, it is submitted, was the right one. In *Caldwell* v. *Village of Island Park* [15] it was held that a member of the public enjoying facilities provided by a local authority is entitled to insist on reasonable care being taken for his safety. It makes no difference whether there was a charge or not.

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[6] [1957] 1 Q.B. 46.

[7] [1955] 1 W.L.R. 207.

[8] [1954] 1 W.L.R. 58; [1953] 2 All E.R. 1572.

[9] (1915) 18 W.A.L.R. 8.

[10] (1953) 87 C.L.R. 619.

[11] [1956] 2 Q.B. 264, 269.

[12] 1956 S.C. 92.

[13] (1915) 20 C.L.R. 181.

[14] 1956 S.C. 92.

[15] (1952) 304 N.Y. 268.

Whether the defendant has taken reasonable care is a jury question. The American Restatement of the Law of Torts, vol. 2, p. 951, para. 347, shows that the view in *Caldwell's* case[15] is that which is generally accepted in the United States of America, and that the duty may be broken even though the plaintiff by the exercise of reasonable care might have detected the danger.

Whether it is an ordinary duty of reasonable care or the particular duty of licensor to licensee is a question of law, and all the facts necessary to answer that question have been determined. There is no unfairness to the corporation in allowing the matter to be dealt with now on a different basis of law which may well be the right basis: see *Connecticut Fire Insurance Co.* v. *Kavanagh.*[16] The relationship between the corporation and the deceased, however it may be described, gave rise to a duty of reasonable care on the part of the local authority—that is supported by the cases cited. [Reference was also made to *Aiken* v. *Kingborough Corporation*[17]; Glanville Williams on Joint Torts and Contributory Negligence, p. 319, para. 77; *Nickell* v. *Windsor*[18] and *Robert Addie & Sons* (*Collieries*) *Ltd.* v. *Dumbreck.*[19]] English cases in which it has been said that the duty of the local authority ought to be higher than that of licensor are *Purkis* v. *Walthamstow Borough Council*[20]; *Ellis* v. *Fulham Borough Council*[21]; *Baker* v. *Borough of Bethnal Green*[22] and *Pearson* v. *Lambeth Borough Council.*[23] Lastly, what was said by Lord Porter in *Boy Andrew* (*Owners*) v. *St. Rognvald* (*Owners*)[24] was in line with what Lord du Parcq said in *Upson's* case.[25]

Robin Cooke following. The judgment under appeal in holding that this case is governed by the special law applying between occupier and licensee wrongly extended the scope of that rule, and the case is governed by the general principles of the law of negligence. The corporation owed a duty of care to the deceased here whether or not such a duty is owed in other situations. In erecting the diving board the corporation represented that the danger arising from the varying depth of the sea did not exist. The corporation in erecting the board created a foreseeable risk of injury; therefore the general principles of the law of negligence

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[15] 304 N.Y. 268.

[16] [1892] A.C. 473, 480; 8 T.L.R. 752.

[17] (1939) 62 C.L.R. 179, 207.

[18] [1927] 1 D.L.R. 379.

[19] [1929] A.C. 358; 45 T.L.R. 267.

[20] (1934) 151 L.T. 30, 34.

[21] [1938] 1 K.B. 212, 221; 53 T.L.R. 884; [1937] 3 All E.R. 454.

[22] [1945] 1 All E.R. 139.

[23] [1950] 2 K.B. 353, 366; 66 T.L.R. (Pt. 2) 561; [1950] 1 All E.R. 682.

[24] [1948] A.C. 140, 153.

[25] [1949] A.C. 155.

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imposed an ordinary duty of care on them unless there is some special rule to the contrary. The special rule of licensor and licensee does not extend to the present case because that rule is concerned with danger *in* or *inherent in* the occupier's own premises. Where the act of the defendant is such that the plaintiff may be misled as to the conditions existing outside the defendant's premises liability may arise. The deceased was deceived by the act of the corporation in placing the board in that position. The case in principle falls within the ordinary negligence principles.

Simmons v. *Huntingdon Corporation*[26] was a case where the corporation were occupiers of the whole of the swimming pool and is distinguishable on its facts from the present case. In short, expressed in terms of representations, the special rule as between occupier and licensee is that the occupier must not misrepresent the state of his own premises. Such an implied misrepresentation may be present where there is some defect in the structure or where the licensee is unaware of the state or limits of the premises, e.g., *Hawkins* v. *Coulsdon and Purley Urban District Council*[27] and *Pearson's* case.[28] The corporation's liability here arises from the fact that by implication they have misrepresented conditions to be safe and led a person to encounter dangerous conditions existing outside their premises. The danger lay in the sea, and the corporation impliedly represented that that danger outside their premises did not exist.

H. A. P. Fisher for the respondent corporation. This is an attempt to persuade this Board to say that the corporation are liable for not giving warning of a danger that was obvious—and has been held to be obvious. The first two points taken for the appellant may be considered together; they were: (1) that apart from any duty owed as occupiers the corporation owed an independent duty in erecting a diving board for the use of the public to take reasonable care for their safety. (2) Even if the duty owed to the deceased was that of licensor to licensee—even if they owed him no independent duty—it was their duty as licensors to take reasonable care for his safety in respect of dangers known to them but not known to and appreciated by him.

Four propositions are submitted as correct in relation to those two points: (1) The duty of an occupier towards a licensee is to warn him of concealed dangers; concealed dangers being such as would not be seen by a person exercising reasonable care. The converse of that proposition would be that there is no duty in respect of obvious dangers; and an obvious danger would be one which a person exercising care for his own safety would see. (2) This duty applies to the static condition of the premises even though that condition results from something done to the premises by the occupier or by anyone else. There is a duty to warn. (3) In relation to current operations to the premises—an alteration of the state of the premises—the occupier owes no further duty than not to alter the condition of the premises in reckless disregard of persons known to be thereon. (4) In relation to things done *on* the premises, but not *to* the premises, the occupier owes the ordinary duty of care.

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[26] [1936] 1 All E.R. 596.

[27] [1954] 1 Q.B. 319; [1954] 1 All E.R. 97.

[28] [1950] 2 K.B. 353.

Those propositions, based on the strongest authorities, are directed to the situation that the deceased was a licensee. That is the only basis on which he can be permitted to place the case before this Board. This being a case where the jury have found that there was not a concealed danger, the case falls exactly within *Fairman* v. *Perpetual Investment Building Society*[29]; that case and *Hawkins'* case[30] support the first of the above four propositions—that there is no duty towards a licensee in respect of obvious dangers. The second proposition is stated shortly in *Excelsior Wire Rope Co.* v. *Callan.*[31] *Robert Addie & Sons'* case[32] was rightly treated on the basis of categories of duties owed to persons coming on the land. *Murdock* v. *A. & R. Scott*[33] supports the third proposition, and is a recent statement of the law by the Court of Session. It is accepted for the purposes of this argument that the law is correctly stated in *Dunster* v. *Abbott*[34] and *Thompson* v. *Bankstown Corporation.*[35] It is clear from those two cases that the duty to exercise reasonable care is there being said to relate to something being done contemporaneously with the actual licensee being there. *Thompson's* case,[35] so far from being an authority in the appellant's favour, is in favour of the corporation—where there is an activity being carried on on the land there is a duty to exercise reasonable care. *Grant's* case[36] and *Upson's* case[37] do not assist the present case. The standard of a reasonable man is the right one to apply in a case like this. Here there had never been an accident during the 30 years that the board had been there.

[29] [1923] A.C. 74, 83, 95; 39 T.L.R. 54.
[30] [1954] 1 Q.B. 319.
[31] [1930] A.C. 404, 412.
[32] [1929] A.C. 358.
[33] 1956 S.C. 309, 315.
[34] [1954] 1 W.L.R. 58.
[35] 87 C.L.R. 619.
[36] [1948] A.C. 549.
[37] [1949] A.C. 155.

In *Riden's* case [38] the defendants were not occupiers and the case was expressly decided on that basis. *Slater's* case [39] is only cited to distinguish it, in that in the present case there was no operation being carried on on the premises. The *Perth Corporation* case [40] cannot assist here; it is plain that the court considered the condition of the land to be a concealed danger.

Coming now to the appellant's third proposition—that as a member of the public using as of right the facilities provided for the public by the local authority the deceased had a higher status than that of licensee, and that the corporation owed him a duty to take reasonable care for his safety—it is submitted, first, that the Court of Appeal were right in saying that because of the way the case had been pleaded to the court and put to the jury the appellant could not be permitted to allege that the deceased was anything but a licensee. It was never suggested that he was an invitee; if it had been wished so to suggest there is a real dilemma in the strictest sense, for two views are possible: (1) even an invitee has no relief where the danger is obvious—there is authority for that proposition; (2) the duty is different, and a finding of no concealed danger is not the end of the case; one cannot say what answer the jury would have given if they had been asked, " was there an unusual danger ? "

Negligence in law involves the existence of a duty, and the jury were given no directions as to the extent of the respondent's duty. Having answered question (1) in the way they did—that there was no concealed danger—there was no evidence on which they could find the respondent guilty of negligence. [Reference was made to *London Graving Dock Co. Ltd.* v. *Horton.*[41]] The jury's verdict of negligence here must be ignored.

It is too late now to allege that the deceased was anything other than a licensee. If the argument is that he was there as of right and there is some higher duty, there is not sufficient material to determine whether he was on the diving board as of right. If the duty is a general one of care, then on a proper direction the jury could not have found the respondent guilty of a breach of it. There was no evidence on which they could find negligence. If the Board are against the respondent on those points, then it is contended that there is authority for saying that the duty owed to a person entering a public park is that owing to a licensee.

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[38] [1957] 1 Q.B. 46.

[39] [1956] 2 Q.B. 264.

[40] 18 W.A.L.R. 8.

[41] [1951] A.C. 737, 749, 756; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

A case of an occupier doing something *to* the land is *Mourton* v. *Poulter.*[42] Glanville Williams in Joint Torts and Contributory Negligence, para. 77, relied on *Horton's* case [43] in the Court of Appeal, but it was reversed in the House of Lords [44]; and, secondly, he relied on Canadian cases, but there are Canadian cases both ways: *Brown* v. *B. & F. Theatres Ltd.*[45]; *Pfister* v. *Toronto Transportation Commission.*[46] If the direction had been given to the jury as to duty on the basis of a general liability in negligence it would have been necessary on the cases to direct them that there was no liability if the danger was obvious: *Aiken's* case [47]; *Hastie* v. *Magistrates of Edinburgh.*[48] In the case of obvious dangers the defendant is guilty of no breach of duty: *Stevenson* v. *Corporation of Glasgow* [49]; *Fairman's* case [50]; *Shillinglaw* v. *J. G. & R. Turner.*[51] See also *Horton's* case [52] on the point as to obvious danger.

If the Board think that it is open to the appellant to argue on the basis that the deceased was something other than a licensee, it is submitted that on the facts he was a licensee. The case for the appellant was either that there is a separate category of persons not falling within the three categories of trespassers, licensees and invitees, namely, persons going "as of right" on to premises of a local authority, and that the duty towards those persons is that of reasonable care; or alternatively, it was said that the deceased was an invitee. It was said by Lord MacDermott in *Horton's* case [53] that there is no fourth category. Admittedly that was obiter and in a dissenting judgment, but it is submitted that it is a correct statement of the law. See also *Robert Addie & Sons'* case [54] and *Latham* v. *R. Johnson & Nephew Ltd.*[55] there cited. "Present as of right" is not a correct use of language to describe a person who goes on a public park. "As of right" as used in the later cases is a vague phrase, not a suitable legal criterion, and it creates more difficulties than it avoids. There are difficulties in applying a general standard of care to a public authority: *Burrum Corporation* v. *Richardson.*[56] In later cases the same proposition has been re-stated, and it has

[42] [1930] 2 K.B. 183, 191; 46 T.L.R. 256.

[43] [1950] 1 K.B. 421.

[44] [1951] A.C. 737.

[45] [1946] 3 D.L.R. 194.

[46] [1946] 3 D.L.R. 71.

[47] 62 C.L.R. 179.

[48] 1907 S.C. 1102.

[49] 1908 S.C. 1034, 1042, 1046.

[50] [1923] A.C. 74.

[51] 1925 S.C. 807.

[52] [1951] A.C. 737, 749.

[53] [1951] A.C. 737, 764.

[54] [1929] A.C. 358, 364.

[55] [1913] 1 K.B. 398, 410.

[56] (1939) 62 C.L.R. 214, 228.

been accepted that *Addie's* case[57] does provide a complete categorization—that there is no fourth class. [Reference was also made to *Murdock* v. *A. & R. Scott*,[58] *Plank's* case[59] and *South Australian Co.* v. *Richardson*.[60]]

Next, English courts have consistently held that persons who go into public parks are licensees. The test applied in *Indermaur* v. *Dames*[61] is conclusive against saying that they are invitees. *Ellis* v. *Fulham Borough Council*[62] is relied on as stating the position clearly. See also the obiter observation of Lord Greene M.R. in *Baker* v. *Borough of Bethnal Green*.[63] In *Glasgow Corporation* v. *Taylor*[64] some of their Lordships treated the case on the basis that the child was a licensee—it cannot be put higher than that. The case has been held consistently to be authority for the proposition that a person entering a public park is a licensee and not an invitee within the meaning of *Indermaur* v. *Dames*.[65] Whether, however, such persons are licensees, invitees, or "as of right," there is no duty to warn of dangers which are not concealed. *Riden's* case[66] is distinguishable from the present case.

Mr. Cooke said that the danger lay in the varying depth of the sea. It is submitted that the danger complained of here was in the diving board. It was said for the appellant that the exit from the land was dangerous. In principle there is no difference between the present case and where a gate leads off the land, or where land ends in a cliff and a sudden drop. Liability depends on the character with which he came onto the land. [*Cooper* v. *Swadling*[67] was referred to.] Here the matter comes within the ordinary duty to a licensee. Take the case where the sea goes right away and it is dry under the board, the danger is obvious and there can be no duty to warn. If the danger is on adjoining land there appears to be no principle on which the defendant can be liable for it.

MacKenna Q.C. in reply. The corporation are seeking to escape liability for a death which was contributed to by a failure to take precautions which a reasonable authority would have taken to safeguard against a danger to the public which the corporation had created and maintained on land occupied by them for the public use. There would be nothing to shock in answering that question adversely to the corporation. [Reference was made to Winfield on the Law of Torts, 2nd ed., p. 616, para. 164.] The deceased was there as a member of the general public enjoying a facility provided by the local authority, and their duty is that of reasonable care. Question (2) put to the jury—about a warning notice and tide-gauge—was exactly the right one, and they were given a direction in law which enabled them to answer it properly in favour of the appellant, and effect ought to be given to it. If the deceased is to be categorized as an invitee, then it is implicit in the jury's answer to the second question that this was an unusual danger. *Glasgow Corporation* v. *Taylor*[68] does not decide that persons going into a public park are licensees. It is open to the Board to hold that they should be put into a special category and entitled to reasonable care.

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[57] [1929] A.C. 358.
[58] 1956 S.C. 309, 315.
[59] 1956 S.C. 92, 120.
[60] (1915) 20 C.L.R. 181.
[61] (1866) L.R. 1 C.P. 274, 287.
[62] [1938] 1 K.B. 212, 228.
[63] [1945] 1 All E.R. 135, 139.
[64] [1922] 1 A.C. 44, 51.
[65] L.R. 1 C.P. 274.
[66] [1958] A.C. 240; [1957] 3 All E.R. 1.
[67] [1930] 1 K.B. 403, 415.

Oct. 14. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW, who stated the facts set out above and continued: There was ample evidence on which the jury could find that the spring-board did not constitute a concealed danger at low tide. Some of the plaintiff's own witnesses said that the water was clear and its shallowness at low tide apparent.

At the trial the plaintiff submitted that the defendants, if not occupiers, would have been under a duty as erectors of the board to take reasonable care for those who might use the board, and that that duty was broken by a failure to put up a warning notice or a tide-gauge. The judge was doubtful at the time when he summed up whether there would, if the defendants were not occupiers, be such a duty. He formulated, however, the following three questions which on his summing up did not arise if the jury answered the first question as to occupancy as they did.

2. Was the defendant negligent in a manner causing or contributing to the fatality in not maintaining a warning notice board or tide-gauge? Answer, Yes.

3. Was the deceased negligent in a manner causing or contributing to the fatality? Answer, Yes.

5. If both the defendant and the deceased were at fault in a manner contributing to the fatality, by what percentage is it just and equitable that the total damages be reduced having regard to the share of the deceased in the responsibility for the fatality? Answer, 80 per cent.

If the only liability on the defendants was to warn against concealed dangers these findings do not avail the plaintiff, and

[68] [1922] 1 A.C. 44, 51, 62.

counsel for the appellant agreed that the appeal must fail. It was, however, submitted that for differing reasons the defendants were under a general duty to the plaintiff, and that the finding could be relied on as establishing a breach of that duty.

It was submitted for the defendants that the answer to question 2 was one which should be disregarded as perverse and inconsistent with the answer to question 1 (2). It was further submitted that as the finding in answer to question 2 was on the basis that the defendants were not occupiers it could not avail the plaintiff (the defendants having been found to be occupiers), even if she succeeded in establishing some general duty of care owed to the deceased. It is unnecessary to consider these submissions, because, for reasons which will be given, the plaintiff fails to establish a general duty of care.

The authorities on the duty of occupier to licensee were considered by Farwell L.J. and Hamilton L.J. in *Latham* v. *R. Johnson & Nephew Ltd.*[1] Farwell L.J. quotes with approval a statement by Williams J. in *Hounsell* v. *Smyth*,[2] adopted by Wightman J. in *Binks* v. *South Yorkshire Railway Co.*[3] "No right is alleged: "it is merely stated that the owners allowed all persons who "chose to do so, for recreation or for business, to go upon the "waste without complaint—that they were not churlish enough "to interfere with any person who went there. One who thus "uses the waste has no right to complain of an excavation he "finds there. He must take the permission with its concomitant "conditions, and, it may be, perils." One recognized exception to this principle is that the occupier must warn the licensee of a danger of which he knows which is in the nature of a trap. "A "trap," said Hamilton L.J.,[4] "involves the idea of concealment "and surprise, of an appearance of safety under circumstances "cloaking a reality of danger." This exception led to the second question put to the jury. If there are no further applicable exceptions the plaintiff fails on the basis that the deceased was a licensee.

The plaintiff submitted that the defendants, although occupiers, were under a general duty to the deceased to take all reasonable steps for his safety having regard to the fact that they had some years before erected the board. If this is right it has always been wrong to say that the plaintiff must take the land as he finds it. He has to take the land on this argument as he would have found it when the occupier went into occupation. In respect of changes made by the occupier the latter's duty to a licensee on this argument is different and greater. Reliance was sought to be placed on *Slater* v. *Clay Cross Co. Ltd.*[5] In that case the plaintiff was a licensee on the defendant's land which included a railway line and a tunnel. The judge found that the accident was due to the negligent driving of a train on the line. The danger did not arise out of the line or the tunnel but out of negligent driving. If an occupier negligently drove a motor-car into a licensee, the principle that the licensee must take the land as he finds it would clearly have no application. Reliance was also placed on a further suggested exception. In *Mourton* v. *Poulter*[6] the plaintiff, a boy of 10, was injured when a tree, which was being cut down, fell. The boy was a trespasser and the defendant was a contractor not the occupier. Scrutton L.J. dealt, however, with the position of an owner[7]: "The liability of an "owner of land to trespassers does not arise where there is on the "land a continuing trap, such as that which was considered in a "case in the Supreme Court of the United States of an innocent "looking pond which contained poisonous matter: *United Zinc* "*and Chemical Co.* v. *Britt.*[8] There, as the land remains in the "same state, a trespasser must take it as he finds it, and the "owner is not bound to warn him. That, however, is a different "case from the case in which a man does something which makes "a change in the condition of the land, as where he starts a "wheel, fells a tree, or sets off a blast when he knows that people "are standing near. In each of these cases he owes a duty to "these people even though they are trespassers to take care to "give them warning." In an earlier decision referred to in *Brock* v. *Copeland*[9] the same principle was applied to a case in which the defendant having encouraged the public to go through his close was liable when damage was done by a bull which he had later put there without warning: see *Latham* v. *R. Johnson & Nephew Ltd.*[10]; see also *Corby* v. *Hill*[11] and *Excelsior Wire Rope Co. Ltd.* v. *Callan.*[12] Such cases have no application to the present case. The spring-board had been erected for years. The argument, unsupported by authority, fails in principle. The licensee must take the land as he finds it and there could be no logic in drawing

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[1] [1913] 1 K.B. 398, 404; 29 T.L.R. 124.

[2] (1860) 7 C.B.N.S. 731.

[3] (1862) 3 B. & S. 244, 252.

[4] [1913] 1 K.B. 415.

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[5] [1956] 2 Q.B. 264; [1956] 2 All E.R. 625.

[6] [1930] 2 K.B. 183; 46 T.L.R. 256.

[7] [1930] 2 K.B. 183, 191.

[8] (1922) 258 U.S. 268.

[9] (1794) 1 Esp. 203.

[10] [1913] 1 K.B. 398, 406.

[11] (1858) 4 C.B.N.S. 556, 563.

[12] [1930] A.C. 404.

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a distinction between its state when the occupier went into occupation and its state when changes had been made by him.

It was further submitted that the law as between licensor and licensee had no application because (1) there was no defect in the diving-board as such, and therefore it could not be regarded as a trap as there was no physical defect in the state or condition of the land, and (2) the danger from its use or misuse at low tide was in the sea outside the area occupied.

No authority was cited for the argument that different principles are applicable if the danger arises from the use of a part of the land not defective in itself. In principle it would involve a fine, and, in their Lordships' opinion, an illogical distinction. A trap as defined by Hamilton J. may consist in an invitation to use a non-defective appliance in a way which turns out to be dangerous. If a door opens over a big drop, it may be a trap if it looks as if it led into the next room. A bridge may be a perfectly good bridge though unsuited to carry more than a ton. If so, it may be a trap for a vehicle over a ton if there is no warning.

On the second point, the fact that the concealed danger is that of injury outside the occupied area, whether in the sea or on a highway or in adjacent property on principle would not seem to prevent the application of the rule. In *Latham* v. *R. Johnson & Nephew Ltd.*[13] Farwell L.J. gives as an obvious illustration, the owner of cliffs by the sea who would not be bound to fence them off.

Finally, the plaintiff sought before the Court of Appeal in New Zealand and before their Lordships to base her claim on a submission that the deceased was not a licensee but either an invitee or a person to whom the defendant as a local authority owed a general duty of care. The principle invoked was adopted and applied by the Court of Session in *Plank* v. *Stirling Magistrates*.[14] The pursuer, a child of two-and-a-half, was injured by falling from a chute erected by a local authority in a playground in a public park. The court held that the local authority was liable in damages on the ground that the child was an invitee and the danger was an unusual one of which the authority ought to have known. This was the ratio of the majority. Lord Mackintosh based his decision on the ground that the child was there as of right, and therefore entitled to rely on the chute being in a reasonably safe condition.

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[13] [1913] 1 K.B. 398, 405.

[14] 1956 S.C. 92.

The question whether in principle persons who are on premises provided by a local authority for the use of the public can or should, apart from authority, be treated as invitees has been discussed in a number of English cases (*Purkis* v. *Walthamstow Borough Council*[15]; *Ellis* v. *Fulham Borough Council*[16]; *Baker* v. *Borough of Bethnal Green*[17]; *Pearson* v. *Lambeth Borough Council*[18]). Their Lordships were also referred, among other cases, to *Aiken* v. *Kingborough Corporation*,[19] *Burrum Corporation* v. *Richardson*,[20] and to the American Restatement of the Law of Torts, Vol. II, para. 347.

The Court of Appeal in New Zealand decided that the point not having been taken at the trial could not be taken on appeal. Barrowclough C.J. said[21]: " She," the plaintiff, " accepted that " he was a licensee: and if she had not accepted it no doubt an " issue somewhat differently framed would have been put to the " jury." Adams J., after considering certain cases, said[22]: " Quite apart from the considerations already mentioned, this " present case was pleaded, fought, and put to the jury on " the footing that the deceased was a licensee, and for my part I " do not see how the appellant could now be permitted to place " her case on a different footing."

In *Connecticut Fire Insurance Co.* v. *Kavanagh*[23] Lord Watson, in delivering the judgment of their Lordships' Board, after referring to the raising of points of law in an appellate court on facts admitted and proved beyond controversy said: " But " their Lordships have no hesitation in holding that the course " ought not, in any case, to be followed unless the court is satisfied that the evidence upon which they are asked to decide " establishes beyond doubt that the facts, if fully investigated, " would have supported the new plea." A similar statement will be found in Lord Herschell's speech in *Owners of Ship Tasmania and Owners of Freight* v. *Smith*.[24]

In an appeal in a case tried with a jury the appellate court must also consider whether further questions would have been left to the jury, their answers to which remain uncertain. Apart from this principle the matter is one of discretion for the appellate court, and their Lordships would be loth to interfere with the discretion as exercised by the Court of Appeal in the present case.

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[15] (1934) 151 L.T. 30, 34.

[16] [1938] 1 K.B. 212, 221; 53 T.L.R. 884; [1937] 3 All E.R. 454.

[17] [1945] 1 All E.R. 135, 139.

[18] [1950] 2 K.B. 353; 66 T.L.R. (Pt. 1) 561; [1950] 1 All E.R. 682.

[19] (1939) 62 C.L.R. 179.

[20] (1939) 62 C.L.R. 214, 379.

[21] [1957] N.Z.L.R. 39.

[22] Ibid. 66.

[23] [1892] A.C. 473, 480; 8 T.L.R. 752.

[24] (1890) 15 App.Cas. 223, 225.

There is a further consideration referred to by Lord Birkenhead L.C. in *North Staffordshire Railway Co.* v. *Edge*[25]: " The appellate system in this country," said Lord Birkenhead, " is " conducted in relation to certain well-known principles and by " familiar methods. The issues of fact and law are orally pre" sented by counsel. In the course of the argument it is the " invariable practice of appellate tribunals to require that the " judgments of the judges in the courts below shall be read. The " efficiency and the authority of a court of appeal, and especially " of a final court of appeal, are increased and strengthened by the " opinions of learned judges who have considered these matters " below. To acquiesce in such an attempt as the appellants have " made in this case, is in effect to undertake decisions which may " be of the highest importance without having received any assist" ance at all from the judges in the courts below." These observations should be read subject to the qualification stated in the speeches of Lord Atkinson and Lord Buckmaster in the same case, but they appear to their Lordships to apply with great force to the present appeal. For it is clear that points which would have plainly arisen if this point had been taken remain in doubt. Was this a public park to which the deceased had access as of right? The judge in his summing up on the issue of occupancy says that the defendants had the " right of stopping people going " there." The board was not apparently put up on the instructions of the defendants to attract the public but at the request of a swimming club to replace a previous board. If the deceased was to be considered as an invitee one would have expected a question put to the jury as to whether the danger of shallow water at low tide was an unusual danger. It is not certain how this question would have been answered.

The reasons given for dismissing the appeal are in substance those given by the Court of Appeal. Their Lordships thought it right to deal with the issues in some detail having regard to the full arguments addressed to them on each side.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed.

Solicitors: *Arnold, Fooks, Chadwick & Co.; Wray, Smith & Co.*

C. C.

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[25] [1920] A.C. 254, 263; 36 T.L.R. 115.

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JOHN NEIL MOUAT . . . . . . APPELLANT;

AND

BETTS MOTORS LTD. . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Emergency Legislation—Price control—Meaning of "price"—Motor-car—Covenant restricting resale—Covenant not part of consideration—Covenant legal—Breach—Damages, measure of—[New Zealand] Control of Prices Act, 1947, *No.* 51, *s.* 2 (1).
Sale of Goods—Price—Meaning of "price"—New Zealand.
Damages—Sale of goods—Condition not to resell except to seller—Resale on black market to third party—Measure of damages.
New Zealand.

By section 2 (1) of the [New Zealand] Control of Prices Act, 1947: "'Price', in relation to the sale of any goods . . . includes "every valuable consideration whatsoever, whether direct or "indirect; and includes any consideration which in effect relates to "the sale of any goods . . . although ostensibly relating to any "other matter or thing."

Section 29 (1) provided that every person who sold any goods to which a price order related for a price which was not in conformity with the order committed an offence against the Act.

The appellant, on buying in 1955 for £1,207—the maximum controlled price under the Control of Prices Act, 1947—a new North American motor-car (then in short supply in New Zealand owing to the economic position) from the respondent dealers, entered into a special covenant with them—as required by the Board of Trade under penalty as a condition of issuing an import licence—under which he agreed not to resell the car within two years unless he first offered it back to the dealers at the original price less a stipulated allowance for depreciation. In breach of the covenant the appellant sold the car three months later for £1,700, and thereupon the respondent dealers claimed £543 as damages for breach of covenant, being the difference between the purchase price of £1,207 less £50 depreciation, namely, £1,157, at which he ought to have offered it to them, and the price of £1,700, at which he had sold the car. The appellant contended that the covenant was illegal and unenforceable because it offended against the Control of Prices Act, 1947, in that the dealers by taking the special covenant were taking a valuable consideration relating to the sale and which formed part of the price in addition to the maximum controlled price of the car:—

Held, that under the statutory definition the only kind of valuable consideration which came within the "price" was a valuable consideration "which in effect relates to the sale." The special covenant did not relate to the sale; the sole and entire inducement for the transfer of the property was the cash sum of £1,207. The special covenant was given for the privilege of being allowed to buy a new car, its purpose being to stop the purchaser taking advantage of his privileged position contrary to the interests of the trade and the public; it was a prerequisite to the transfer of the property and not part of the consideration for it, and could not properly be said to form part of the "price" within the statutory definition. The special covenant was not, therefore, illegal.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD DENNING.

Further, even if the "price" did include the special covenant, there was no illegality, for the importers of the car were entitled to assume that the price control authority knew that dealers had to exact a special covenant and fixed the maximum price on that basis, and thus the price charged by the dealers, even if it was to be regarded as including the special covenant, was in conformity with the price fixed by the price control authority.

The fact that under the Board of Trade conditions the respondents, had the appellant sold the car to them for £1,157, could not have resold it at a price exceeding its price new—£1,207—was a matter peculiar to the dealers and was no concern of the appellant. The respondents were entitled in law to be put into as good a position as if the appellant had fulfilled his covenant, and were entitled to buy a similar car at the market price. That rule applied even though the only available market was a surreptitious market which was fed by persons who had broken their covenants. The price of the car in that market was £1,700, and the respondents were entitled to the sum claimed.

Williams Brothers v. *Ed. T. Agius Ltd.* [1914] A.C. 510 at 531 and *British Motor Trade Association* v. *Gilbert* [1951] 2 T.L.R. 514; [1951] 2 All E.R. 641 considered.

Judgment of the Court of Appeal of New Zealand [1957] N.Z.L.R. 380 affirmed.

APPEAL (No. 1 of 1958) from a judgment of the Court of Appeal of New Zealand (Gresson and McGregor JJ., Adams J. dissenting) (March 8, 1957) affirming a judgment of the Supreme Court of New Zealand (Barrowclough C.J.) (June 26, 1956) awarding the respondents, Betts Motors Ltd., £543 damages and costs for breach of a contract in an action brought by them against the appellant, John Neil Mouat.

The following facts are taken substantially from the judgment of the Judicial Committee: On March 7, 1955, John Neil Mouat, a farmer, bought a new 1954 Chevrolet motor-car for £1,207. He bought it from dealers called Betts Motors Ltd., and at the same time he entered into a special covenant with them in these terms:

"1. The covenantor will not (except by will) during the space "of two years after the delivery of the said vehicle to the covenan-"tor deal with the said vehicle in any manner whereby any other

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" person or corporation may become entitled to the possession or " use of the said vehicle other than for the private purposes of the " covenantor or for the purpose of carrying on any profession " trade or business of the covenantor or whereby the property in " the said vehicle (or any charge thereon) is or may be or become " liable to be transferred to or vested in any other person or " corporation or whereby any mortgage or charge thereon is con- " ferred upon any other person or corporation without first making " an offer to the dealer (irrevocable for fourteen days) to resell the " said vehicle to the dealer at the original sale price thereof set " out in the schedule hereto less an allowance by way of depre- " ciation calculated at the rate of ten pounds (£10) for every " complete 1,000 miles run by the said vehicle since the date of " delivery to the covenantor but so that such allowance shall not " be less than fifty pounds (£50) or more than one hundred and " fifty pounds (£150) and at the time of making such offer " delivering the said vehicle and leaving it for examination for a " reasonable time with the dealer.

" 2. The covenantor will for every breach of his agreement " with the dealer hereinbefore contained pay to the dealer as and " by way of liquidated damages and not as a penalty (but with- " out prejudice to any other rights and remedies of the dealer " hereunder) the sum of one thousand pounds (£1,000)."

The price paid by Mouat was £1,207: but in breach of the covenant Mouat, three months later, sold the car for £1,700. Betts Motors Ltd. thereupon sued him for damages for breach of covenant. They admitted that they could not recover the £1,000 because it was a penalty, but they sought to recover damages assessed on the following basis: Mouat, instead of selling the car for £1,700, ought to have offered to resell it to Betts Motors Ltd. for £1,157 (being £1,207 less £50 depreciation): and they claimed £543 (being the £1,700 he got less the £1,157 at which he ought to have offered it to them). Mouat pleaded that the covenant was illegal and unenforceable. He contended that the covenant was a valuable consideration relating to the sale of the car and so formed part of the price, within the meaning of the Control of Prices Act, 1947, and was accordingly illegal and unenforceable by virtue of section 29 (1) thereof. Alternatively, he said that the damages recoverable were not £543 but only £50.

By the Control of Prices Act, 1947, s. 2 (1): "'Price', " in relation to the sale of any goods or to the performance of " any services, includes every valuable consideration whatsoever, " whether direct or indirect; and includes any consideration which "in effect relates to the sale of any goods or to the performance "of any services, although ostensibly relating to any other matter "or thing."

Section 29 (1): "While a Price Order or a special approval "in respect of any goods remains in force every person who, "whether as principal or agent, and whether by himself or his "agent, sells or agrees or offers to sell any goods to which the "Order or approval relates for a price that is not in conformity "with the Order or approval commits an offence against this "Act."

1958. July 17, 21, 22. *R. B. Cooke* for the appellant. The first question is whether the covenant was illegal and unenforceable. One of the conditions of the import licence under which the suppliers imported the car into New Zealand was that a covenant in favour of the dealer similar to that taken in the present case should be required by the dealer from the retail purchaser, and much turns in this case on whether that element of compulsion makes any difference. The questions are: (1) Apart from the element of compulsion, is the covenant valuable consideration relating to the sale? (2) Does the element of compulsion alter the case? (3) If the covenant was valuable consideration relating to the sale and therefore part of the price within the meaning of the Control of Prices Act, 1947, was that price in conformity with the special approval fixed by the Director of Price Control? As to the first question, what moves from the buyer is money plus the covenant, and that is the consideration for the sale. The covenant was clearly valuable consideration, was therefore part of the consideration within the meaning of the Act of 1947, and by taking it as well as the money the respondents committed a breach of the Act. The covenant falls fully within the classic definition of "valuable consideration" derived from *Currie* v. *Misa* [1]—"some right, interest, profit, or benefit "accruing to the one party, or some forbearance, detriment, loss, "or responsibility, given, suffered, or undertaken by the other." And in Pollock on Contracts, 13th ed., p. 133, the effect of consideration is stated thus: "An act or forbearance of the one "party, or the promise thereof, is the price for which the promise "of the other is bought, and the promise thus given for value is "enforceable." See also *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[2] This covenant was part of the price of the respondent's promise to sell. *Thomas* v. *Thomas*[3] is a case of a covenant by a transferee being held consideration for an agreement to transfer. On similar reasoning to that now advanced, two magistrates, before the present case was heard, had held in other cases that the covenants were part of the price and were unenforceable when taken in addition to the fixed price. But those judgments give no assistance on the question of compulsion.

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[1] (1875) L.R. 10 Ex. 153, 162.

[2] [1915] A.C. 847, 855; 31 T.L.R. 399.

Coming to the second question—whether what would otherwise be consideration for the sale is excluded from being consideration because it was compulsory for the seller to take it—the respondents did exact the covenant in return for parting with the property in the car; the fact is that they would not sell without; their motive for requiring the covenant is irrelevant; and it is difficult to see on what principle compulsion can alter the case. Alternatively, the covenant taken by the respondents was not in the terms required by the Board of Trade conditions.

The final stage in considering the question of illegality is whether, assuming the covenant to be part of the price for which the car was in fact sold, that price was in conformity with the special approval of the Price Tribunal. There is no evidence that the Director of Price Control knew of the conditions, or that the special approval was intended to fix a price subject to those conditions. Prima facie, the proper principle of construction in the case of an instrument issued under an Act is to construe the terms of that instrument as bearing the same meaning as they bear in the Act: *Blashill* v. *Chambers*.[4] Apart, however, from any rule of construction, it is most unlikely that the authority administering the Act intended to use " price " in some different sense than money, and it is certainly not to be presumed.

Next, assuming that the covenant is enforceable, what loss to the respondents was reasonably foreseeable at the time of the contract as the result of its breach? Their profit on a resale would have been limited to £50, for if the appellant had complied with the agreement and resold the car to the respondents for £1,157 (£1,207 less £50 depreciation), the respondents under the Board of Trade conditions could not have sold it for more than £1,207. In the circumstances of a binding covenant, and in view of the restrictions imposed on dealers by the Board of Trade, the only reasonably foreseeable consequence to the respondents was that they would lose an opportunity of making a profit of £50. The chief cases on which *British Motor Trade Association* v. *Gilbert* [5]—the market value case—is founded are *Rodocanachi, Sons & Co.* v. *Milburn Brothers* [6] and *Williams Brothers* v. *Ed. T. Agius Ltd.*,[7] and they show that considerations peculiar to the plaintiff are to be disregarded. The prima facie rule—the difference between contract and market price—is liable to be displaced if the parties contemplated a contract by the plaintiff to resell at a specific price. The law is summarized by Denning L.J. in *Stockloser* v. *Johnson* [8]—the basic principle is what would be in the reasonable contemplation of the parties. See also *Biggin & Co. Ltd.* v. *Permanite Ltd., Berry Wiggins & Co. Ltd.* (*Third Parties*),[9] which shows that the principle of reasonable contemplation may operate to reduce damages. The ultimate purpose of damages for breach of contract is to put the plaintiff in the position he would have been in if the contract had been performed. If it had been performed here, the respondents might have made a profit of £50. Alternatively, the basis of the market price principle is that the plaintiff may go into the market and buy similar goods: *Barrow* v. *Arnaud*.[10] In the present case there is no evidence of the market to which the dealer could go to buy a similar car; there was only evidence of the price which such a car would fetch. [Reference was also made on damages to *J. Leavey & Co. Ltd.* v. *G. H. Hirst & Co. Ltd.*[11] and *Household Machines Ltd.* v. *Cosmos Exporters Ltd.*[12]]

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[3] (1842) 2 Q.B. 851, 859.

[4] (1884) 14 Q.B.D. 479, 485; 1 T.L.R. 151.

J. G. Le Quesne for the respondents. First, the word "price" in the Act of 1947 does not include the advantage derived by a seller from a covenant such as that taken by the respondents. Secondly, whether that be right or wrong, this special approval did permit the sale of this car for £1,207 plus the advantage of such a covenant. With regard to the first submission, in Part III of the Act prices are fixed by reference to a maximum price on a particular date, and the language used indicates that the maximum price which is referred to is something to be distinguished from what is called the terms on which the goods are sold. If that is so in Part III of the Act, one is entitled to say that it would be a strange thing if prices were to be fixed in Part III by reference to a price which does not include the advantage of a covenant such as this, and nevertheless in Part II they must be fixed so as to include the advantage of these covenants. The power under Part II, therefore, is to fix prices in the sense of everything which is to be demanded or received in money or the equivalent, but excluding the advantage of what the legislature itself describes as terms or conditions of the sale. The legislature is using the word " price " in the ordinary sense. If terms and conditions are separately expressed from the price, then it must follow that " price " does not include the terms and conditions. What is approved under section 16 is what the seller is allowed to demand in money or money's worth; so that he is left free by the special approval to require special conditions, such as the covenant here.

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[5] [1951] 2 T.L.R. 514; [1951] 2 All E.R. 641.

[6] (1886) 18 Q.B.D. 67; 3 T.L.R. 115.

[7] [1914] A.C. 510.

[8] [1954] 1 Q.B. 476, 489; [1954] 1 All E.R. 630.

[9] [1951] 1 K.B. 422, 435; 66 T.L.R. (Pt. 2) 944; [1950] 2 All E.R. 859.

[10] (1846) 8 Q.B. 604, 609.

[11] [1944] K.B. 24, 28; 60 T.L.R. 721; [1943] 2 All E.R. 581.

[12] [1947] K.B. 217; 62 T.L.R. 757; [1946] 2 All E.R. 622.

The second question is the interpretation of the special approval. The correct reading of it is that the sellers were authorized to take £1,207 plus the benefit of the covenant—that the Director of Price Control has authorized a sum which may be asked by a dealer fulfilling his legal obligations, and that means exacting a covenant as required by the Board of Trade conditions. As to the director's knowledge, in view of the provisions of the Customs Act these conditions were in fact legislation. Alternatively, if that is wrong, and actual knowledge is required, there is evidence of such wide distribution that it can be inferred that the director knew about the conditions. Accordingly, the price charged by the respondents, even if it is to be regarded as including the special covenant, was in conformity with the price fixed by the director.

If the above two submissions are wrong, then it is contended in answer to the appellant's main point that the covenant is not valuable consideration relating to the sale, and therefore in no way is it part of the price for the purposes of the Control of Prices Act or for the purposes of the special approval. The promise must be something in consideration of which the promise of the other party to the contract is given: Pollock on Contract, 13th ed., p. 133. The respondents did not part with the property in this car in return for the covenant, and it is not the covenant which induced them to part with the property. They took £1,207 because that was the consideration which they required for parting with the property in the car. Their reason for taking the covenant was quite different. In these circumstances it was the £1,207 which was the consideration and the whole of the valuable consideration relating to the sale. The taking of the covenant was a transaction connected with the sale in the sense that a sale not having taken place the covenant would not have been taken, but it was not consideration relating to the sale. The taking of the covenant was a prerequisite to a legal sale of the property required by the Board of Trade and not itself a part of the consideration. For these reasons, this covenant cannot be brought within the definition of price.

With regard to damages, the reasonably foreseeable consequence to the respondents from a breach of the covenant was that they would be left without a car which, if the covenant had been observed, they would have got for £1,157. The damage which would flow from that breach was the difference between £1,157 and the price for which the respondents could have got such a car after the breach. That is nothing more than the common law position now contained in section 51 of the Sale of Goods Act, 1893. *Williams Brothers* v. *Ed. T. Agius Ltd.*[13] sets out exactly the position here. The evidence shows that there was a market, and it would have been possible for the respondents after the breach of this covenant to buy a similar car, and there is a finding of Barrowclough C.J. that the market price was £1,700. In any case, if the respondents had acquired the car under the covenant they might have kept it until the original period of two years had expired, after which they could have sold it without any restriction of price. The damages were rightly assessed below.

Cooke in reply. The effect of the compulsion is simply that the seller must take a certain consideration. The covenant was an integral part of the contract of sale. As to damages, the fallacy here in respect of available market lies in the fact that any goods which the dealer did obtain elsewhere would not be similar goods, for what the covenant provided for was that the dealer would receive this particular car, which by virtue of general legal restrictions could only be sold by the dealer at not more than a certain figure. The respondents do not bring themselves within the necessary conditions of the available market rule in that they failed to show that there was an available market. The proper method of assessing the damages here is that laid down in *J. Leavey & Co. Ltd.* v. *G. H. Hirst & Co. Ltd.*[14]

Oct. 20. The judgment of their Lordships was delivered by Lord Denning. In 1954 and 1955 the motor-car trade in New Zealand was faced with a problem. There was a big demand for new motor-cars from North America: but there were not enough dollars available to pay for them all. So the number imported had to be strictly limited. The problem was how to ensure that this limited number was fairly distributed. To secure this, the Board of Trade introduced a licensing system under which no person could get one of these new cars unless he could show a special case for it. He might, for instance, be a doctor who needed it for his work. But it is obvious that, unless there were safeguards, such a system would be open to abuse. A person might put forward a plausible case for a new car and so get it from an authorized dealer at the list price: but then soon afterwards resell it at a much higher price to someone else, thus making an undeserved profit. In order to protect the trade and the public from such abuses, the dealers in New Zealand used to require the purchaser of a new car to enter into a special covenant not to resell the car within two years unless he first offered it back to the dealer at the original price less depreciation. The present case concerns one of these special covenants.

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[13] [1914] A.C. 510.

[14] [1944] K.B. 24.

[His Lordship stated the facts and the terms of the covenant, and continued:] Their Lordships propose first to consider the legality of this covenant. It is said to be illegal because it offended against the statute which controlled prices. The controlled price for this car was £1,207, which was the maximum which could be charged for it: and it is said that, by taking the special covenant, the dealers were taking a valuable consideration in addition to the price. The dealers replied that they were compelled to take the covenant. The Board of Trade only allowed the car to be imported on condition that the dealers insisted on such a covenant. These contentions make it necessary for their Lordships to set out the two forms of control exercised over cars at this time by the authorities in New Zealand.

The one control was exercised by the Board of Trade under the authority of section 46 of the Customs Act, 1913, as amended by section 8 of the Customs Acts Amendment Act, 1939, and section 3 of the Customs Acts Amendment Act, 1953. Under those sections no cars could be imported without licence, and the Board of Trade could grant licences subject to conditions. The import licence in this case was given by authority of June 4, 1954, to General Motors Ltd. They were allowed to import cars from Canada and the United States of America, subject to a series of conditions which included, in particular, these two—

"9. In order to assist in ensuring distribution for essential "needs, each dealer will require the purchaser to sign a deed of "covenant or an agreement that in consideration of the payment "of, say, 1s. by the dealer, the purchaser will not within a "period of two years from the date of purchase of the new car sell "or transfer or otherwise dispose of the car except to resell it to "the dealer at the price which the car has been sold, less "depreciation at a fixed rate.

"10. Upon a purchase by a dealer under the preceding paragraph, the dealer will not resell the car at a price exceeding "the price at which the car was sold new, plus any necessary "reconditioning cost charged at ordinary rates . . . On any resale, "the dealer will require the purchaser to enter into a deed of "covenant or agreement of the kind set out in the preceding "paragraph to cover the unexpired balance of the original period "of two years."

Under the Customs Act, it was provided that if any person committed any breach of the conditions or was knowingly concerned in any such breach, he was liable to a penalty of £200 or the value of the goods.

In view of those conditions it is plain that the dealers, Betts Motors Ltd., had no option but to insist on Mouat signing a covenant as a condition of getting the car.

The other control was exercised by the Price Tribunal set up under the Control of Prices Act, 1947. Under sections 15 and 16 of that Act the tribunal were empowered to make price orders fixing the maximum prices that could be charged for goods or to give special approval to a selling price in respect of the sale of any goods. The maximum price in this case was fixed by a special approval contained in a direction which the Director of Price Control issued by a letter to General Motors Ltd. in these terms:

"1954 and 1955 Chevrolet Sedans

"In pursuance of a recent decision by the Price Tribunal "regarding maximum prices for motor-cars imported completely "knocked down from North America, Dominion wide maximum "retail selling prices are now approved for Chevrolet Sedans as "follows:

"1954	£1,207 each
"1955	£1,238 each."

It was agreed by counsel that that direction must, for present purposes, be taken to have been in force on March 7, 1955, before Betts Motors Ltd. made the sale to Mouat. The question is whether it was legitimate for Betts Motors Ltd., in the face of that direction, not only to charge £1,207 for the car, but also to take the special covenant. This depends on the true application to this case of the following provisions of the Control of Prices Act, 1947. [His Lordship read section 2 (1) and section 29 (1) of the Act of 1947, and continued:] In applying those sections to the present case, the first question is: what was the "price" charged for this Chevrolet car? Was it £1,207 alone, or was it £1,207 plus the special covenant? Their Lordships are of opinion that, under the statutory definition, the only kind of valuable consideration which comes within the "price" is a valuable consideration "which in effect relates to the sale." The special covenant in this case was, in a sense, valuable consideration—just as any collateral contract is consideration for the making of a main contract—but it did not relate to the sale. It is of the essence of a sale that the property in the goods should be transferred from the seller to the buyer: and a valuable consideration only relates to the sale if it is given as the inducement—or one of the inducements—for the transfer of the property. In this case the sole and entire inducement for the transfer was the cash sum of £1,207. The special covenant was not given for the property but for something different. It was given for the privilege of being allowed to buy a new car. It was not expected to yield any benefit to the seller. Its purpose was to stop the purchaser taking advantage of his privileged position contrary to the interests of the trade and the public. It was a prerequisite to the transfer of the property and not part of the consideration for it. In these circumstances their Lordships think it cannot properly be said to form part of the "price" within the statutory definition.

Even if the "price" did include the special covenant, their Lordships think there was no illegality. The only document fixing the maximum price of £1,207 was contained in a letter from the Director of Price Control to the importers, General Motors Ltd. Their Lordships agree with McGregor J. in thinking that, when the Director of Price Control sent this letter, he must be presumed to have been aware of the conditions imposed by the Board of Trade—which required the dealers to exact this special covenant. It would be a strange thing if one Government Department—the Director of Price Control—was unaware of what another Government Department—the Board of Trade—was doing in relation to the self-same cars. The Board of Trade on June 4, 1954, gave the import licence and imposed the conditions. The price control in 1955 fixed the maximum price of £1,207. Each was contained in a letter to the self-same importers, General

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Motors Ltd. The importers who received those letters were entitled to assume that the right hand of government knew what the left hand was doing, and therefore to assume that the Director of Price Control knew that dealers had to exact a special covenant and fixed the maximum price on that basis. In other words, the letter fixing the maximum price must be read as if there were added to it the words: "It is understood, of course, that in "selling at this price the dealers will be exacting a special "covenant as required by the Board of Trade conditions." So read, it is clear that the price charged by the dealer, even if it is to be regarded as including a special covenant, was in conformity with the price fixed by the price control.

It was pointed out that this special covenant is somewhat different in its terms from that required by the Board of Trade conditions: but the differences are not so substantial as to affect the matter. The £1,207 plus this special covenant was still in conformity with the price direction.

Their Lordships are of opinion, therefore, that this special covenant was not illegal, and they turn to the question of damages. It is said that the damages suffered by the dealers only amounted to £50. If Mouat had performed his covenant and offered to resell the car to the dealers, Betts Motors Ltd., for £1,157 (£1,207 less £50 depreciation), the dealers, under the Board of Trade conditions (which their Lordships have set out), could only have resold it for £1,207. So their loss, it is argued, is only £50. The result of this argument, if right, is that Mouat would benefit to the extent of nearly £500 by breaking his covenant. He made a profit on resale of £543 (£1,700 less £1,157) and would only have to pay £50 damages.

In the opinion of their Lordships the argument is not well founded. It does not lie in Mouat's mouth to say that, if he had fulfilled his covenant, the dealers could only resell the car for £1,207. That was a matter peculiar to the dealers which was no concern of his. The dealers were entitled in law to be put into as good a position as if he had fulfilled his covenant: and to do this they were entitled to go into the market and buy a similar car at the market price; see *Williams Brothers* v. *Ed. T. Agius Ltd.*[1] by Lord Moulton. This rule applies even though the only available market is a surreptitious market which is fed by persons who have broken their covenants; see *British Motor Trade Association* v. *Gilbert.*[2] The market price of this car in that market was

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[1] [1914] A.C. 510, 531

[2] [1951] 2 T.L.R. 514; [1951] 2 All E.R. 641.

£1,700. At any rate, Mouat can hardly deny that that was its market price, since that is the sum for which he sold it: and the damages should be the difference between that market price of £1,700 and the contract price of £1,157.

Their Lordships find themselves, therefore, in agreement with the decision of Barrowclough C.J. and the majority of the Court of Appeal in New Zealand, and will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs.

Solicitors: *Rose, Johnson & Hicks; Wray, Smith & Co.*

C. C.

[HOUSE OF LORDS.]

DIRECTOR OF PUBLIC PROSECUTIONS . APPELLANT;

AND

HEAD . . . . RESPONDENT.

H. L. (E.)*
1958
Jan. 15, 16;
Mar. 6.

Criminal Law—Mental deficiency—Carnal knowledge of mentally defective girl—Defence—Whether woman lawfully detained in institution—Whether prosecution must prove lawful detention at time of offence—Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *ss.* 1, 9, 56 (1) (*a*).

Mental Deficiency—Detention order—Validity—Order not supported by the medical certificates—Whether void or voidable.

Evidence—Public document—Production from proper custody—Mental deficiency—Detention order.

Presumption—Rebuttable—Legality—Detention—Mental deficiency.

Burden of Proof—Criminal case—Offence against mental defective—Detention—Legality.

Void or Voidable—Administrative order—Mental deficiency—Detention order—Not supported by the medical certificates.

By section 56 (1) of the Mental Deficiency Act, 1913: "Any "person—(*a*) who unlawfully and carnally knows . . . any woman "or girl under care or treatment in an institution or certified house "or approved home, or whilst placed out on licence therefrom or "under guardianship under this Act . . . shall be guilty of a "misdemeanour. . . ."

The respondent was convicted of carnal knowledge of a mental defective contrary to section 56 (1) (*a*) of the Act. At the time of the alleged offences the woman concerned was on licence from an institution for defectives to which she had been sent as a "moral "defective," pursuant to an order made by the Secretary of State in July, 1947, in purported exercise of powers under the Act. This order was produced in evidence by the prosecution, as were also subsequent orders transferring her to other institutions and finally to the one from which she had been released on licence. At the trial the prosecution also produced the two medical certificates which were before the Secretary of State when he made the order and on which he had to be satisfied that she was a defective, but neither certificate contained any evidence on which it could be said that she was a "moral defective" within section 1 (1) (*d*) of the Act. The prosecution conceded that the order of 1947 was defective and that on an application for a writ of habeas corpus it could be successfully challenged. The Court of Criminal Appeal quashed the conviction. On an appeal by the Crown to the House of Lords:—

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD SOMERVELL OF HARROW and LORD DENNING.

Held (Viscount Simonds dissenting), that the decision of the Court of Criminal Appeal quashing the conviction should be upheld.

Per Lord Reid, Lord Tucker and Lord Somervell of Harrow. Proof that a woman was detained as an inmate in one of the specified institutions and that she was under care or treatment therein as a defective, or that she was out on licence from one of the places to which the system of licences under the Act applied, was prima facie evidence that she was a defective lawfully under care or treatment as such or on licence, but if it was shown (as in the present case) that on the face of the documents produced and received in evidence without objection, the detention was illegal, the presumption of defectiveness went and the prosecution must fail. If the original order was invalid it could not be cured by the continuation orders and a subsequent reclassification of the woman by placing her in a different category of defectiveness, coupled with evidence that she was at the material date a defective within that category.

Per Viscount Simonds. Section 56 does not impose on the prosecution the burden of proving that the person under care or treatment or placed out on licence was not only in fact under such care or treatment or so placed out, but also was lawfully detained.

Per Lord Denning. Here the original order of the Secretary of State was not void, but only voidable, and until it was quashed it must be regarded as good, so that it was sufficient to support the continuation orders made on the faith of it. The woman's detention was therefore lawful. In quashing the conviction the Court of Criminal Appeal acted on a mistaken ground. But it would not be fair in the circumstances to restore the conviction.

By the majority. The prosecution should have in court, available for inspection by defending counsel, the relevant orders or other documents on which the detention was based.

Per Lord Somervell (all but Lord Denning agreeing). I am not satisfied that the original order was not void or that, if it was only voidable, a man should be sent to prison on the basis that it was a good order when the court knows it would be set aside if proper proceedings were taken. The case was never argued on those lines below.

Decision of the Court of Criminal Appeal [1958] 1 Q.B. 132; [1957] 3 W.L.R. 862; [1957] 3 All E.R. 426 affirmed.

APPEAL from the Court of Criminal Appeal (Lord Goddard C.J., Donovan and Havers JJ.).

This was an appeal by the Crown from a decision of the Court of Criminal Appeal which on November 1, 1957, had allowed an appeal by John Shortriggs Head against his conviction on May 22, 1957, at the Cumberland Assizes held at Carlisle on his trial before Hinchcliffe J. on an indictment charging him with having carnal knowledge of a mental defective on October 7, 1956. The woman was at the time on licence from Dovenby Hall Hospital at Cockermouth in Cumberland. He was charged under section 56 (1) (*a*) of the Mental Deficiency Act, 1913. The appeal was brought pursuant to a certificate of the Attorney-General granted on November 11, 1957.

The facts stated by Lord Tucker and Lord Denning were as follows: The indictment contained two counts alleging that the respondent on two occasions in October, 1956, had carnal knowledge of a girl named Elfreda Henderson, a mental defective on licence from an institution for mental defectives.

It is sufficient to set out one of these counts, which reads as follows:

"Statement of Offence

"Carnal knowledge of mental defective, contrary to section "56 (1) (*a*) of the Mental Deficiency Act, 1913.

"Particulars of Offence

"John Shortriggs Head on October 7, 1956, in the County of "Cumberland had carnal knowledge of Elfreda Henderson a "woman on licence from Dovenby Hall Hospital, an institution "for mental defectives."

Miss Henderson was born on July 6, 1928, in Cumberland, and left school at 14. She then went out to work but when she was nearly 16 her mother left home. Some months passed. Her father found that she was beyond his control and brought her before the juvenile court as a refractory young person. The court ordered her to be sent to an approved school. She was at an approved school in Somerset for over two years. She then absconded and was brought back by the police. The sister in charge of the school said she was absolutely irresponsible and unfit to be at large. Thereupon, the question arose whether she ought not to be sent to an institution for defectives under section 9 of the Mental Deficiency Act, 1913, which says: "Where the Secretary of State is satisfied from the certificate of "two duly qualified medical practitioners that any person who is "in" an approved school "is a defective, the Secretary of State "may order that he be transferred therefrom and sent to an "institution for defectives. . . ."

On June 10, 1947, she was examined by two medical men, one the certifying medical officer for Somerset, the other a medical practitioner in Bath. Each examined her separately and each certified that he had satisfied himself that she was a moral defective. Neither certificate showed that she required "care, "supervision and control for the protection of others," which by section 1 of the Mental Deficiency Act, 1913, as amended by the Mental Deficiency Act, 1927, was an essential requirement in certifying a person as a moral defective. Then on July 2, 1947, just before she was 19, the Secretary of State made this order: "Whereas, in pursuance of section 9 of the Mental Deficiency "Act, 1913, the above-named Freda (properly Elfreda) Henderson has been duly certified to be mentally defective within the "meaning of the above-mentioned Act as subsequently amended, "I hereby order that she be transferred from the school in which "she is now detained to the Convent of the Good Shepherd "Certified Institution of St. Anne's, Saltash, Cornwall. (Signed) "J. Chuter Ede, One of His Majesty's Principal Secretaries of "State."

On July 21, 1947, within a few days of going to the convent in Cornwall, she was found to be of such "dangerous or violent "propensities" that the Board of Control ordered her to be removed to the Moss Side State Institution at Liverpool—a place specially set aside for serious cases of mental defectiveness. Whilst she was there, continuation orders were made, and when she became of age the statutory visitors held the reconsideration of her case which the law requires. They reported that she was a moral defective and was a proper person to be detained. The statute gave a right of appeal from that decision but neither she nor her parents appealed. After she had been five years at Moss Side she had improved sufficiently to be sent to an ordinary institution. She was sent eventually to Dovenby Hall. In 1954, when she was 26, the medical superintendent of that hospital, Dr. Ferguson (who gave evidence at the trial), classified her as a "feeble-minded person" rather than a "moral defective," but she was still a defective within the Act, and the Board of Control made a continuation order. By October 31, 1955, she had improved so much that Dr. Ferguson granted her a licence to St. Catherine's College, Keswick. He did this so as to try to rehabilitate her. She worked at that college as one of the domestic staff. It was in 1956, whilst she was still out on licence, that the accused—in spite of explicit warnings—had intercourse with her. In October, 1957, she was discharged. Apparently she was then cured, for shortly afterwards she married another man.

The superintendent of Dovenby Hall gave evidence for the prosecution at the trial and produced and put in evidence certain documents relating to Miss Henderson for the purpose of proving that she was lawfully detained as a defective and duly let out on licence on the material date. The documents included the order made by the Home Secretary dated July 2, 1947, for her transfer to the certified institution in Cornwall. The subsequent orders transferring her to other institutions and finally to Dovenby Hall were also produced. The licence permitting her to be absent was not put in evidence. Donovan J. in the Court of Criminal Appeal was mistaken in thinking it had been proved and received in evidence.

Counsel for the defence challenged the validity of the girl's detention and certification as a defective as disclosed by these documents. Hinchcliffe J. ruled that the Home Secretary's order of July 2, 1947, was conclusive and the defence could not go behind it, and in his direction to the jury he told them as a matter of law that on the documents produced she was properly certified as a defective and on the uncontradicted evidence of the superintendent, Dr. Ferguson, she was a mental defective. In substance, therefore, the only real issue left to the jury was as to the acts of carnal knowledge which were proved by the girl and not seriously challenged. The respondent having been warned by the superintendent, when the girl had been out on licence on a previous occasion, that she was a patient on licence from the institution as a defective, a defence under the proviso to section 56 was not open to him and he did not give evidence. He was accordingly convicted.

Sir Reginald Manningham-Buller Q.C., A.-G., Rodger Winn and *Alan Booth* for the Crown. Under the Mental Deficiency Act, 1913, it is not necessary that the woman should have been dealt with as a mental defective under the Act. The question whether she was properly and lawfully detained is irrelevant.

The Crown is prepared to argue this case on the footing that the first order made was not valid. Other considerations arise with regard to subsequent orders.

Section 56 (1) (*a*) of the Act does not require proof of valid certification or a valid order as an ingredient of the offence. A woman may be a defective without being dealt with as a defective under the Act. If she is under care and treatment in an institution or certified house or approved home, or is on licence therefrom, it is to be inferred that she is a mental defective. Mental defectiveness is a question of fact: see sections 1 and 2.

As to the production of the "relevant documents" referred to by the Court of Criminal Appeal, the medical superintendent is not competent to produce any of the certificates, but care and treatment can be proved as a fact without production of the "relevant documents." There is nothing in section 56 (1) (*a*) which requires proof by the Crown of the certificates or of any order. There may often be cases where there is not available admissible evidence of the legality of the detention. It is a burden which it might be quite impossible for the prosecution to discharge. There is no reference to a "defective" in section 56 (1) (*a*), but there is in section 56 (1) (*b*), (*c*), (*d*) and (*e*), and under them a certificate would not be admissible; it would be strange if only under section 56 (1) (*a*) was it necessary to prove that the woman was legally certified and detained, and the subsection does not say that. The exercise of the power of the Secretary of State depends on his being satisfied by the certificate of two medical practitioners that the patient is a defective. Here there is ample evidence that at the time of the commission of the offence this woman was a defective. It can be argued that the continuing orders were operative orders. The Act contains no provision for the production of the order and certificates: see, for example, section 11. The prosecution is not competent to prove them. The documents do not prove themselves, and, if the decision of the Court of Criminal Appeal is right, the prosecution must fail unless the persons who made them are called. The Documentary Evidence Act, 1868, and the Evidence Act, 1938, do not apply. Thus the proper question is whether the woman was under care and treatment in an institution for mental defectives, and, if that is proved, it is no defence that she has never been legally certified. If the court order under which she was in fact detained was good on the face of it, she could be licensed. The order must stand until it is quashed, and the licence under it is a good licence. What Lord Goddard C.J. said on this point in the Court of Criminal Appeal [1] is wrong. The words "under the Act" do not mean that for the purposes of section 56 (1) (*a*) there must be a certification. Voluntary patients are just as much in need of protection as involuntary patients, and section 56 applies to them. See also sections 3, 4 and 12 of the Act. The Mental Treatment Act, 1930, deals with the position of voluntary patients: see sections 1 (1) and 21 (1) and section 341 of the Lunacy Act, 1890.

This woman was examined on four occasions after the order of the Secretary of State. These examinations could not have been made unless she was a mental defective at the time. This, too, suggests that mental defectiveness is a question of fact: see *Rex* v. *Cook.*[2] It is not a matter of status at all. Licence is also a question of fact. Mental defectiveness does not depend on a person being found to be defective nor on being in an institution in consequence of an order. Section 56 (1) (*a*) applies to approved homes, although the person be there otherwise than under an order. Here, even if the reason given in the certificates is wrong, that is not enough to nullify the evidence of Dr. Ferguson, who was not cross-examined or challenged. In such a case as this the doctor has all the records and is satisfied as to his conclusion, but that is very different from what can be proved in court under the laws of evidence.

There is no statutory provision for producing these documents in court. There is difficulty in proving a judicial authority. Magistrates' courts are not courts of record: see Taylor on Evidence, 12th ed., vol. II, p. 990, para. 1592. Under section 9 of the Lunacy Act, 1890, the procedure is informal and there is no record in a minute book of the original examination: see Halsbury's Statutes of England, 2nd ed., vol. XVII, p. 1064. It is hard to prove an order made by a magistrate under section 4 of that Act without calling the magistrate as a witness.

From the fact that a person is in an institution, there is a strong inference that she is a defective within the Act of 1913. The Act was not intended to allow a trial of a question of this kind to turn into a trial of the Board of Control. The sidenote to section 56 refers to "Protection of defectives from acts of "sexual immorality, procuration, etc." It is a general protection for the defectives defined in the section and does not depend on orders or certificates: see section 8 of the Sexual Offences Act, 1956, which now replaces section 56 of the Act of 1913.

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[1] [1958] 1 Q.B. 132, 139; [1957] 3 W.L.R. 862; [1957] 3 All E.R. 426.

[2] [1954] 1 W.L.R. 125; [1954] 1 All E.R. 60.

If in such a case as this it appeared on the evidence that the woman was not in fact a defective, the case would fail. But, in the first place, all the prosecution has to do is to show that she is under care or treatment in an institution, although, of course, the fact that she is an inmate is not conclusive evidence of her defectiveness. Her being under care or treatment or out on licence at the material time is a pure question of fact, and to establish that fact it is not necessary to prove that she was legally detained. Nor can the defendant question the legality of the detention.

In habeas corpus proceedings there must be a return to the writ giving the reasons for the detention, but the facts need not be set out: see Halsbury's Laws of England, 3rd ed., vol. XI, pp. 41–43, paras. 79 seq. There follows verification by affidavit and the court has not power to inquire into the truth, as in criminal cases the truth of the return cannot be traversed. As to civil proceedings, see section 1 (1) and (2) of the Evidence Act, 1938. In habeas corpus civil proceedings there would be no difficulty in securing the admission of the necessary documents. See also *Reg.* v. *Board of Control, Ex parte Rutty*.[3] The practice in such proceedings does not help as to proof of the documents in the present case: see section 2 of the Documentary Evidence Act, 1868. See also Halsbury's Laws of England, 3rd ed., vol. XV, pp. 366 seq.

As to the meaning of the words "under the Act," what was said by Lord Goddard C.J. and Donovan J. in the Court of Criminal Appeal[4] is wrong as placing too heavy a burden on the Crown. If the words were read as meaning "under care or "treatment in a place approved under the Act," the Crown would have no objection. Another meaning does not fit the section. It would result in a trial within a trial, raising issues more suitable to habeas corpus or certiorari proceedings or actions for false imprisonment. The first thing that the prosecution must prove is that the woman was under care or treatment in an approved home within section 61. Any care or treatment is enough. There is no qualification in section 56. The Act relates to women who are defectives. All that need be proved is that the woman is under care or treatment in the home as a defective. The girl in this case was discharged because she was presumably no longer a defective. The Act is for the protection of defectives and it is immaterial that the original order was invalid; all that has to be shown is that the woman was a defective at the material time.

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[3] [1956] 2 Q.B. 109, 113, 120, 124; [1956] 2 W.L.R. 822; [1956] 1 All E.R. 769.

[4] [1958] 1 Q.B. 132, 139, 142.

The Crown's contentions avoid putting an impossible burden on the prosecution and enabling an accused person to escape on a merely technical point. The words "whilst placed out on "licence therefrom" apply unless it is shown that the woman was not a defective at the time. It is not suggested that the operation of the Act should be extended to persons who are not defectives. If a woman who was out on licence ceased to be a defective, there would be no prosecution. There can be no hard-and-fast rule. A lot must be left to the discretion of the police.

As to what are the relevant documents, see *Smith* v. *East Elloe Rural District Council.*[5] The Crown's contention is that the prosecution do not have to produce any documents, but, if they do, they must be limited to the order which warranted the original detention and the continuation orders. These are in force until they are quashed. If the prosecution were required to prove their validity as an ingredient of the case, there is no machinery by which they can do it. Proof of mental defectiveness, not of lawful detention, is required by section 56 (1) (*a*) of the Act of 1913. These documents are admissible not for the purpose of showing whether or not the woman was legally detained but whether or not she was a defective at the time of the alleged offence. It is irrelevant whether in the distant past some order was made which may not have had justification. The other view is going beyond the plain words of the Act. The question whether the woman was or was not legally detained is irrelevant both for the prosecution and the defence. What must be shown is that she was in an institution of the character defined in the Act and that she was under care or treatment as a defective. The question of her legal detention does not become relevant when she is out on licence. The question of a licence is entirely one of fact, whether de facto the woman was out on licence. It is not whether she was lawfully out on licence. In either case she is within the protection of the Act. The machinery of Part I of the Act of 1913 is irrelevant to this charge.

If it is desired to challenge the order, that should be done by certiorari or habeas corpus, in which this woman might well have succeeded.

[5] [1956] A.C. 736, 769–770; [1956] 2 W.L.R. 888; [1956] 1 All E.R. 855.

In any event, this is a case for the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907: see *Stirland* v. *Director of Public Prosecutions*.[6] Whatever happens, the respondent will not be required to go back to prison.

Rodger Winn following. There would be great evidential difficulties in proving the orders which are not really the essential point. A challenge to the legality of the detention should turn rather on the factual aspect of the matter: see *Richardson* v. *London County Council*.[7] Section 56 (1) (*a*) comprises within its protection many persons in whose cases the vital issues would not appear on the documents, since the facts to which the documents relate may be 10 years or more old.

The answer to the question whether or not the detention was lawful is not an element which has to be established by the prosecution. If the evidence leaves any doubt whether a woman at the time of the offence alleged was a mental defective, the accused is entitled to be acquitted. The subsection does not require the prosecution to establish positively that the woman was a mental defective, substituting other proofs. Nevertheless, if the defence shows that it is open to rational doubt whether the woman was a defective, or if it was effectively established that she was not a defective at the material time, the accused is entitled to be acquitted. To prove that anyone is mentally defective for the purposes of section 1 (2) one must prove defectiveness before the age of 18. To prove that effectively beyond reasonable doubt in any particular case when the woman is substantially above that age may prove impossible, because there is a lacuna which cannot be filled. It is enough for the prosecution to prove what the section contemplates. But if in the course of the prosecution's case or after the defence opens the defence challenges the allegation that the woman was a defective at all, then there would be an issue and at the end of the day the jury would be entitled to bring in a verdict of acquittal if there was a reasonable doubt on that point.

G. W. Guthrie Jones for the respondent. In a prosecution under section 56 (1) (*a*) the prosecution must prove (1) intercourse; (2) that the woman was a mental defective, and (3) that she was under care or treatment in an institution or was allowed out properly under licence. By "properly" is meant legally—in accordance with the terms of the Act. The onus rests on the prosecution. There is no analogy to a plea of insanity by an accused person. If a lesser burden had been intended, section 56 (1) (*a*) would have included some such words as "unless "he proves that she was a defective." Once something is an ingredient of an offence it must be proved by the prosecution unless the relevant Act put the burden on the defence. It would be wrong to affirm this conviction because the trial judge improperly removed the issue of the girl's mental deficiency from the jury.

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[6] [1944] A.C. 315; 60 T.L.R. 461; [1944] 2 All E.R. 13.

[7] [1957] 1 W.L.R. 751; [1957] 2 All E.R. 330.

Even if the fact of being under care or treatment in an institution raises a presumption that the woman is a mental defective, the defence may displace it by cross-examining the medical witnesses or calling medical evidence in rebuttal. The issue of mental deficiency should be left to the jury. One way in which the accused may prove that he did not know and had no reason to know that the woman in question was a defective is to establish that in fact she was not a defective. In section 56 (1) (*a*) the expression "mental defective" is not found, because under sections 2 and 4 a woman must be a mental defective before she may be dealt with under the Act, and sections 49 and 50 (which refer to certified houses and approved homes) likewise refer to "defectives." In section 71 the definitions of "certified institution," "certified house" and "approved home" all contain the word "defective."

The defectives dealt with by section 56 (1) (*a*) are defectives "within the meaning of the Act" as stated in section 1. This girl was not found to be a defective within any of the four categories in that section. If she was not a defective within the Act the prosecution may not prove that she was in fact a defective. The detention order was made under section 9, and under that section the Home Secretary must be satisfied that the woman was a defective in the sense of falling within one of the categories in section 1. The medical certificates in support of the Home Secretary's order contained no ground for saying that this girl did so. In section 56 (1) (*a*) the phrase "under this Act" applies both to the words "under care and treatment" and "whilst "placed out on licence." This girl was not a defective under the Act and was unlawfully detained. Parliament is not to be taken to have been legislating to cover the case of women unlawfully detained. The illegality under the original order continued. On a reading of section 11 of the Act of 1913 it is clear that validation of the original order by subsequent orders is not possible. The original order was saved from expiry by the subsequent orders. It was the original order which was saved from expiry, and an invalid order cannot be validated. The continuation orders have no separate existence apart from the order which they purport to continue. In the case of continuation orders there are not the same safeguards as in the case of original orders. Here the original order is void and not merely voidable, since the Home Secretary's act was outside his jurisdiction and not an erroneous exercise of jurisdiction because he purported to create a fresh category of mental defective outside the terms of the Act.

It is not enough for the prosecution to say that the woman was de facto in the home. A woman who voluntarily becomes a patient within the Act of 1913 voluntarily clothes herself with the status necessary for the application of section 56. That is quite different from the case of a woman who was taken there involuntarily and was in fact falsely imprisoned and the victim of a tort. If she was falsely imprisoned, it cannot be said that because of that the act of intercourse has become a crime. A woman who is not lawfully under care or treatment cannot be lawfully under care or treatment under the Act.

As to licence, one can only license a person to go out if one has the power lawfully to restrain her from going out. Here there was no power to grant a licence because she was unlawfully detained. This girl was under no obligation to return to the institution and her status was that of a normal woman of full age. She would have been entitled to refuse to go back, and if she overstayed her leave no one could apprehend her (see section 42). For an offence to be committed it was necessary that she should be lawfully detained; de facto treatment was not enough. The same principles apply to section 61. Anyone having intercourse with the woman was not committing any offence; it was no different from any other act of intercourse between persons of full age.

The prosecution is bound to prove the original order, which, if valid, establishes a prima facie case. It is the original document which provides the authority and there is no difficulty about proving it. It can only be proved by being produced from proper custody. It must be produced to prove its contents and also as real evidence of the authority to detain the woman. It is analogous to a record of conviction in a case of imprisonment. The production of the original order from proper custody as authority for the detention proves lawful detention in such a prosecution as this, as it would in proceedings under habeas corpus: see section 10 of the Act of 1913. The provisions of section 11 (5) are unnecessary in respect of the original order. If the difficulties suggested in relation to proof of the original order were well founded, the Board of Control could not establish lawful detention until at least one continuation order had been made. *Smith* v. *East Elloe Rural District Council*,[8] cited for the Crown, does not apply to such a case as this where there never was any jurisdiction to make the order; it is the difference between being void and being voidable. The only way of questioning the order is to ask to see the material on which it was made.

This is not a case for the application of section 4 (1) of the Criminal Appeal Act, 1907.

Sir Reginald Manningham-Buller Q.C., A.-G., in reply. As to the question of proof of the lawfulness of the detention, it is not accepted that the lawfulness of the detention is essential to the establishment of the offence. As to the evidence required in proving the documents, see Halsbury's Laws of England, 3rd ed., vol. XV, p. 354, para. 636. The procedure under section 3 of the Act of 1913 emphasizes the difficulty of proving documents brought into existence 10, 20 or 30 years before. The case of habeas corpus is different in that affirmative proof of lawful detention is required.

No valid argument can be founded on section 42 of the Act of 1913. A person who has escaped from an institution can be arrested without a warrant. The village constable does not have to prove that she was lawfully detained before he takes her back to the institution. It was argued that one can only license a person whom one has power to restrain. But a licence has in fact been granted and so long as it is in force the condition of section 56 (1) (*a*) is satisfied, although a person whom it was sought to restrain might resist the attempt on the ground that there was no right to restrain her.

The question whether or not a woman is a defective does not depend on the legality of her detention. One is not here concerned with the question how the woman was admitted to the home, whether lawfully or not. The prosecution must simply show (1) carnal knowledge, and (2) that at the time she was under care or treatment as a defective. The defence may, of course, challenge that she was a defective within the Act. One must not read into the subsection something which is not there. No question of the lawfulness of the detention arises under it.

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[8] [1956] A.C. 736.

The proviso to section 56 (1) adequately protects a man who did not know or had no reason to suppose that a woman was a defective.

Their Lordships took time for consideration.

March 6. VISCOUNT SIMONDS. My Lords, the facts of this case are fully set out in the opinion of my noble and learned friend, Lord Tucker. I will not occupy time by stating them myself, though I am conscious that the few observations that I have to make are not easily intelligible without them. I do not doubt that questions of great importance are directly or indirectly raised by the judgment of the Court of Criminal Appeal in this case, but in accordance with the practice which has consistently been observed since the Court of Criminal Appeal was established they were not formulated for the consideration of the House. In the result I have for my part found it difficult to determine exactly what is the question for decision—and by that I mean, of course, the question which is at issue between the appellant and the respondent in this appeal. I should not think it desirable, particularly in a criminal case, to travel outside that issue.

The bald facts of the case are that the respondent was charged with having had carnal knowledge of a woman who was placed out on licence from an institution for mental defectives contrary to section 56 (1) (*a*) of the Mental Deficiency Act, 1913. He was convicted, but upon appeal the conviction was quashed. It was quashed upon the ground that the woman was not lawfully detained in the institution. The Lord Chief Justice said[1] that where a man was prosecuted for this offence (now an offence against section 8 of the Sexual Offences Act, 1956), "evidence "must be given by the production of the relevant documents "that the woman in respect of whom the charge is made was at "the time of the offence lawfully subject to the Act." Donovan J. used similar language. The documents under which the woman was detained were in fact produced at the trial. I need say no more than that on the face of them they appeared to be defective. The Attorney-General in the Court of Criminal Appeal admitted that in appropriate proceedings they could be successfully challenged, e.g., upon a writ of habeas corpus. He did not recede from this admission before the House but contended that it was irrelevant whether or not in such proceedings they could be challenged. He urged that the relevant section of the Act was passed for the protection of a certain class of women, amongst them women " under care or treatment in an institution . . . or " while placed out on licence therefrom." He conceded that in its context the expression " under care or treatment " meant under care or treatment as a mental defective, but contended that, if the woman was in fact under such care or treatment in an institution or placed out on licence therefrom, it was not open to the defendant to question the legality of the detention. He pointed out that the proviso gives adequate protection to a man who, being charged with the offence, proves that he did not know and had no reason to suppose that she was a defective.

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[1] [1958] 1 Q.B. 132, 139; [1957] 3 W.L.R. 862; [1957] 3 All E.R. 426.

My Lords, this House no less than other courts of law is traditionally jealous to safeguard the liberty of the subject; but I agree with the learned Attorney-General that such a consideration is irrelevant to the present case. Is it the man's liberty or the woman's that is at stake? Not his, unless a man is to be at liberty to have carnal knowledge of any woman who is under treatment in an institution on the chance that a defect may be found in the order of detention; nor hers, for she is not a party, nor are the proper authorities parties, to the proceedings, and her eventual liberty will be determined by other considerations beyond those of a defect in an order made many years ago.

I speak with diffidence, knowing that I differ from the Court of Criminal Appeal and from the majority of your Lordships, but I cannot refrain from saying with what anxiety I regard the possibility that, as a result of this decision, whenever a man is charged with this offence, he can, though he knows that the woman is under care or treatment as a mental defective, demand to see all " the relevant documents " (whatever they may be) and, finding perchance a flaw in them, successfully plead that she was not lawfully detained and that he, therefore, has committed no offence. I must, I think, assume that any defect which would support a writ of habeas corpus would be available to him, and further, that the same result would follow whether the woman was, as in the present case, on the high road to recovery or was such a defective as to stand in particular need of the protection afforded by the Act.

I would therefore decline to read section 56 of the Act as imposing on the prosecution the burden of proving that the person under care or treatment in an institution or placed out on licence therefrom was not only in fact under such care or treatment or so placed out on licence but also was lawfully detained.

The Attorney-General supported his case by the plea that, if the prosecution had to prove lawful detention of an inmate of an institution, the burden of proof might be very heavy, and this plea was much debated. If upon its true construction the section imposes this burden, I respectfully doubt whether it is material that the burden is heavy or light. In the view which I take this question does not arise, but if it did, I should be content to adopt what my noble and learned friend, Lord Tucker, says about it, and I would join in the reservations made by my noble and learned friend, Lord Somervell of Harrow.

One other point should be mentioned. It was not clear to me whether one of the questions at issue in this appeal was whether in a prosecution for this offence the Crown must prove that the woman was at the time of the offence a mental defective. I think that at one time the learned Attorney-General was inclined to accept that burden. But, if so, he was in my opinion wrong. I believe that all your Lordships take the same view. The appeal will, in accordance with your Lordships' opinion, be dismissed with costs.

LORD REID. My Lords, I have had the advantage of reading the speeches about to be delivered by my noble and learned friends. I agree with that of Lord Tucker and I would concur in the reservations to be made by Lord Somervell of Harrow.

LORD TUCKER. My Lords, on May 22, 1957, the respondent was convicted of two offences against section 56 (1) (*a*) of the Mental Deficiency Act, 1913, after a trial before Hinchcliffe J. and a jury at the Cumberland Assizes held at Carlisle. He appealed to the Court of Criminal Appeal who quashed his conviction on November 1, 1957. The Director of Public Prosecutions now appeals to this House pursuant to the certificate of the Attorney-General granted on November 11, 1957.

[His Lordship stated the facts and continued:] Amongst the documents put in evidence at the trial were the two medical certificates required by section 9 of the Act for the satisfaction of the Secretary of State before he could make a valid order for the girl's transfer to an institution at which she would be under compulsory detention as a defective. These certificates stated that she was a moral defective but neither of them showed that she required " care, supervision and control for the protection of others," which is, by section 1 of the Mental Deficiency

Act, 1913, as amended by the Act of 1927, an essential requirement before any person can be classified as a moral defective. In the Court of Criminal Appeal (Lord Goddard C.J., Donovan and Havers JJ.) the Attorney-General admitted the invalidity of the original order of the Secretary of State, and the court, holding the resulting detention unlawful, quashed the conviction.

In the Court of Criminal Appeal two judgments were delivered, one by the Lord Chief Justice and one by Donovan J. The Lord Chief Justice stated the contention of the Crown as follows[2]: "The Attorney-General submitted that all that the "prosecution had to prove to establish a case in addition to the "fact of carnal knowledge having taken place was that the girl "was in fact in an institution for care or treatment, or that she "was out on licence from such an institution. He submitted "that the section did not require proof that the girl was a "defective."

Before your Lordships I understood the Attorney-General to say that the prosecution must prove that the girl in question was an inmate in one of the institutions named and receiving care and treatment therein or on licence therefrom and that at the time of intercourse she was a mental defective. I understood this as meaning that proof of mental deficiency must be given in addition to and independently of the fact of lawful detention.

At the conclusion of his judgment the Lord Chief Justice said[3]: "So that there may be no doubt on the matter, I desire "to say that where a man is prosecuted for this offence, which is "now an offence against section 8 of the Sexual Offences Act, "1956, evidence must be given by the production of the relevant "documents that the woman in respect of whom the charge is "made was at the time of the offence lawfully subject to the "Act."

Donovan J. used these words[4]: "Accordingly, I think the "prosecution were right to produce the various documents "relating to the woman's detention, and to produce the licence. "Nor do I think that such a practice, which ought to be followed, "can lead to any great difficulty unless there are many of these "patients illegally detained, which I prefer not to suppose."

The Attorney-General submitted that these statements placed a burden on the prosecution which was not justified by the Act, and that they would tend to result in a trial within a trial of issues more suitable to proceedings by way of habeas corpus or certiorari or in actions for false imprisonment, and that the necessity for strict proof of documents made or facts having taken place many years ago would in some cases render prosecutions impossible.

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[2] [1958] 1 Q.B. 132, 139.

[3] Ibid. 139–140.

[4] Ibid. 142.

My Lords, it will be apparent from what I have said, and indeed the Court of Criminal Appeal so stated, that this appeal raises questions of considerable importance with regard to the construction of section 56 of the Act and the matters essential for the prosecution to prove.

It may be convenient at this stage to set out section 56 (1) in full and to refer to certain other sections of the Act before stating what I consider to be the answer to the problems which have been raised: " Any person—(*a*) who unlawfully and carnally " knows, or attempts to have unlawful carnal knowledge of, any " woman or girl under care or treatment in an institution or " certified house or approved home, or whilst placed out on " licence therefrom or under guardianship under this Act; or " (*b*) who procures, or attempts to procure, any woman or girl " who is a defective to have unlawful carnal connexion, whether " within or without the King's dominions, with any person or " persons; or (*c*) who causes or encourages the prostitution, " whether within or without the King's dominions, of any woman " or girl who is a defective; or (*d*) who, being the owner or " occupier of any premises, or having or acting or assisting in the " management or control thereof, induces or knowingly suffers " any woman or girl who is a defective to resort to or be in or " upon such premises for the purpose of being unlawfully and " carnally known by any man, whether such carnal knowledge " is intended to be with any particular man or generally; or " (*e*) who, with intent that any woman or girl who is a defective " should be unlawfully and carnally known by any man, whether " such carnal knowledge is intended to be with any particular " man or generally, takes or causes to be taken such woman or " girl out of the possession and against the will of her parent or " any other person having the lawful care or charge of her; shall " be guilty of a misdemeanour and shall be liable upon conviction " on indictment to be imprisoned, with or without hard labour, " for any term not exceeding two years unless he proves that he " did not know, and had no reason to suspect, that the woman or " girl was a defective."

Section 1, as amended, defines mental defectives and the provisions thereof relevant to the present case are as follows:— " (1) The following classes of persons who are mentally defective "shall be deemed to be defectives within the meaning of this "Act:—(*a*) Idiots" (who are defined); "(*b*) Imbeciles" (defined); "(*c*) Feeble-minded persons" (defined); "(*d*) Moral "defectives, that is to say, persons in whose case there exists "mental defectiveness coupled with strongly vicious or criminal "propensities and who require care, supervision and control for "the protection of others. (2) For the purposes of this section, "'mental defectiveness' means a condition of arrested or incomplete development of mind existing before the age of eighteen "years, whether arising from inherent causes or induced by "disease or injury."

Section 2 provides for defectives being dealt with under the Act by being sent to or placed in an institution or placed under guardianship.

Section 3 deals with sending a defective to an institution or placing him under guardianship by order of a judicial authority or under order of a court, or in the case of a defective detained in a prison or other specified place of a like nature by order of the Secretary of State.

Section 10 authorizes the detention of a defective sent to an institution under order, and of a defective placed under guardianship by any such order. And by subsection (2) provides that subject to regulations an order placing a defective under guardianship shall confer on the person named as guardian such powers as would have been exercisable if he had been the father of the defective and the defective had been under the age of 14.

Section 12 (2) enacts that subject to the foregoing provisions of the section a defective placed by his parent or guardian in an institution or under guardianship may be detained.

Section 30 places upon local health authorities the duty to ascertain what persons within their area are defectives subject to the Act (otherwise than under paragraph (*a*) of subsection (1) of section 2), and to make provision for them.

Section 49 applies to certified houses all the provisions of the Act relating to institutions and the patients therein.

Section 50 enables the Minister of Health to approve of certain premises wherein defectives are received in certain circumstances, and such premises are referred to as an approved home. Subsection (2), however, enacts that it shall not be lawful to receive or detain in an approved home any person ordered to be sent to an institution for defectives under an order of the judicial authority or a court or a Secretary of State.

Section 56 is in Part IV of the Act, which deals with offences and legal proceedings.

Section 52 is, I think, worth setting out. It reads: "If "any person, having been warned by a person appointed to "be guardian of a defective under this Act, or by a "person under whose charge a patient absent from an "institution or from a certified house has been placed, not to "supply intoxicants to or for the use of the person under his "guardianship or charge, knowingly supplies any intoxicants to "or for the use of that person, he shall be guilty of an offence "under this Act: Provided that a person shall not be guilty of "the offence of supplying intoxicants in contravention of the "warning if the person giving the warning refuses, when required "so to do, to produce the authority under which he acts." It will be observed that the last-mentioned section does not create the offence of knowingly supplying intoxicants to a defective, but of supplying intoxicants after warning to "a person" under guardianship or absent from an institution.

Returning to section 56, here also it will be noticed that nowhere is the simple offence of having carnal knowledge of a defective created, and in subsection (1) (*a*) the word "defective" does not appear. The Court of Criminal Appeal construed the words "under this Act" at the conclusion of subsection (1) (*a*) distributively as applying to the preceding words "under care "or treatment in an institution or certified house or approved "home, or whilst placed out on licence therefrom," and concluded that the subsection applies—to quote from the judgment of Donovan J.[5]—only to "a person who has been found to belong "to one of the four categories of defectives specified in section 1, "and who is, in consequence of an order made under the Act, "having care or treatment in an institution, or is out on licence "by virtue of regulations made under the Act."

My Lords, I think the presence of the words "or approved "home" negative this construction as there is no machinery anywhere in the Act for placing anyone in an approved home by order or in any other manner. In the present case, however, your Lordships are concerned only with the case of a person who had purported to be detained in, and let out on licence from, an institution under the provisions of the Act.

In my opinion, the subsection has been carefully framed for the protection of persons who are undergoing care or treatment as

[5] [1958] 1 Q.B. 132, 141.

defectives in certain specified institutions, or are on licence or under guardianship under the provisions of the Act.

The Lord Chief Justice observed that it would no doubt be presumed that prima facie a person in a certified institution was a defective within the Act. I respectfully agree with this view, which is, I think, reinforced by the words "under care or treatment" which in the context must mean under care or treatment as a defective within the meaning of the Act. In my view, on proof that a girl is detained as an inmate in one of the specified institutions and under care or treatment therein as a defective or is shown by the production of the licence to be out on licence from one of those places to which the system of licences under the Act is applicable, that is prima facie proof that she is a defective lawfully under care or treatment as such, and I think the Attorney-General—if I correctly understood him as previously stated—was assuming an unnecessary burden if he meant that it is incumbent on the prosecution in all cases under section 56 to satisfy a jury by medical evidence that the girl in question comes within one or other of the categories specified in section 1. I think this is to be presumed. But the foundation for the presumption, in the case of a person under detention or on licence, is the legality of the detention and the necessity for a licence to justify the patient's absence, and if it is shown and admitted, as in the present case, that on the face of the documents produced and received in evidence without objection the detention was illegal, the whole basis of the subsection and the presumption of defectiveness goes and the prosecution must fail. I do not think anything more than what I have stated above is required to establish a prima facie case, but it is right and proper that the prosecution should have in court and make available for inspection by defending counsel the relevant orders or other documents upon which the detention is based so that in a proper case, and subject to questions of admissibility in evidence, the presumption of legality may be rebutted.

My Lords, it remains only to state that I agree with the reasons of the Court of Criminal Appeal for rejecting the Crown's contention that even if the original order was invalid it had been cured by the continuation orders and a subsequent reclassification of the girl by the superintendent placing her in a different category of defectiveness, coupled with his evidence to the effect that she was at the material date a defective within that category.

For these reasons I would dismiss this appeal.

I desire to add that I have read the opinion about to be delivered by my noble and learned friend, Lord Somervell of Harrow, and that I agree with the views expressed therein.

Lord Somervell of Harrow. My Lords, I agree with the opinion that has been given by my noble and learned friend, Lord Tucker, and have nothing I wish to add to it.

I have had the advantage of reading the opinion about to be given by my noble and learned friend, Lord Denning, and would like briefly to make my reservations. My noble friend thinks that the Secretary of State's order of July 2, 1947, was voidable and not void.

I am not satisfied that the order was not void. On the wording of section 9 of the Mental Deficiency Act, 1913, I think the certificates may well be for this purpose part of the order to be looked at in order to see whether it is good on its face. If they are not part of the order it might, I think, be maintained that they afford no evidence on which the order made could validly have been based. In either case I would wish to reserve the question whether the order would not be void rather than voidable.

It is conceded that the court had material before it which would have led to the order being quashed on certiorari or other appropriate proceedings. The next question, as it appears to me, can be stated in this way. Is a man to be sent to prison on the basis that an order is a good order when the court knows it would be set aside if proper proceedings were taken? I doubt it. The case was never argued on these lines before the Court of Criminal Appeal.

The distinction between void and voidable is by no means a clear one, as a glance at the entry under " void " in Stroud's Judicial Dictionary shows. I am not satisfied that the question whether a man should go or not go to prison should depend upon the distinction.

I would dismiss the appeal for the reasons given by my noble and learned friend, Lord Tucker.

Lord Denning. My Lords, the first point is whether it is necessary for the prosecution in such a case as this to prove that the woman was lawfully detained; and if it is necessary, how are they to prove it? The Lord Chief Justice gave this ruling on the point[6]: " So that there may be no doubt on the matter, I desire " to say that where a man is prosecuted for this offence, . . .

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[6] [1958] 1 Q.B. 132, 139–140.

"evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was at the time of the offence lawfully subject to the Act."

The Lord Chief Justice was, I think, only referring to the case of a woman detained under compulsion, not to a voluntary patient. In such a case, I think, his ruling is correct. The prosecution must prove that the woman is *lawfully* under care or treatment. and they can only do this by proving that she is *lawfully detained*: and they must prove that she is under care or treatment *as a defective*, not for any other illness. But they need not prove that she *is* a defective. Suffice it to prove that she is lawfully detained *as* a defective. That raises a presumption that she is a defective. The accused man is protected from any injustice by the proviso which gives him a defence if "he proves "that he did not know, and had no reason to suspect," that she was a defective. At any rate, in the case of a woman "placed "out on licence," I think it is clear that there must be in force a subsisting order for her detention. The medical superintendent cannot grant her a licence to be absent unless he has a right to compel her to stay: and she is only "on licence" so long as there is a right to bring her back; see regulations 95 to 97 and section 42. In the case of a "licence," therefore, the prosecution must prove that the woman is lawfully subject to the Act; else she is free and not on licence at all.

The Attorney-General took exception to the ruling of the Lord Chief Justice. He submitted that it was not necessary for the prosecution to prove that the woman was *lawfully detained*. If there were such a burden on the prosecution, he foresaw great difficulty in discharging it. The prosecution would have to call the medical men who examined the woman many years ago when she was first certified as a defective, and also evidence that she was "found neglected," or whatever else was the particular ground on which she was "dealt with" under the Act. That would be a burden of such magnitude that the imposing of it would make the section a dead letter.

I do not think the difficulty is nearly so great as the Attorney-General fears. It is only necessary, as the Lord Chief Justice said, to produce the relevant documents. My noble and learned friend, Lord Tucker, says that it is not necessary even to go so far as that. It is sufficient to prove that the woman detained is an inmate of an institution—under care or treatment as a defective—and then rely on a presumption of legality without giving in evidence any of the relevant documents. I cannot bring myself to go as far as this. It seems to me to offend against a fundamental principle. No one in this country can be detained against his will except under the warrant of lawful authority; and when that warrant is required by law to be in writing, it must be produced on demand to the person detained and to any other person properly concerned to challenge the detention. When the legality of the detention has to be proved in a court of law, the document itself must be produced. It is the best evidence and nothing less will do. In *The Queen's Case*,[7] Abbott C.J., giving the opinion of the judges to this House, said that it " is a rule of " evidence as old as any part of the common law of England, " namely, that the contents of a written instrument, if it be in " existence, are to be proved by that instrument itself, and not by " parol evidence ": and in *Strother* v. *Barr*[8] Best C.J. said that " great writers on the law of evidence say, if the best evidence " be kept back, it raises a suspicion that if produced, it would " falsify the secondary evidence on which the party has rested his " case." Whilst I readily acknowledge that that rule has been relaxed in modern times, it has never, so far as I know, been relaxed in the case of orders which deprive a person of his or her liberty. If the order is in existence, it ought to be produced. If it is kept back, it raises a suspicion that there is something wrong with it. In 1802 when a man was committed to the Fleet Prison for debt, it was held that, to prove that fact, the original warrant of commitment must be produced; see *Salte* v. *Thomas*.[9] And in 1847, when a question arose whether a prisoner in the Bridewell at Abingdon was in lawful custody, Maule J. ruled that the oral evidence of the governor was not sufficient; nor was the calendar signed by the clerk of assize; but it could only be proved by the record of his conviction at the assizes; see *Reg.* v. *Bourdon*.[10]

But this would put the prosecution in a great difficulty, says the Attorney-General. The documents do not prove themselves: and it may be next to impossible to prove them strictly. This is a criminal case and the Evidence Act, 1938, does not apply. Mr. Guthrie Jones says there is no such difficulty. It is sufficient to produce the original orders. I agree with him.

Consider for a moment how legality would be proved in habeas corpus proceedings. If the woman herself applied for a writ of habeas corpus, it would be sufficient for the medical superintendent of the hospital, in his return to the writ, to set out the order of detention and the continuation orders as a justification for her detention. He would not have to prove those orders by calling the makers of them or by proving the handwriting on them or anything of that sort; see *Leonard Watson's* case.[11] The production of those would suffice: see *Greene* v. *Home Secretary*.[12] If the orders disclosed on the face of them a ground sufficient in law for her detention, the court would hold her detention to be lawful (see Wilmot's Notes of Opinions and Judgments, pp. 106–108 (Opinion on Habeas Corpus)), unless she could show that the orders were forgeries or that there was no evidence on which the orders could be sustained, see the Habeas Corpus Act, 1816, *Bailey's* case,[13] *Reg.* v. *Board of Control, Ex parte Rutty*.[14]

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[7] (1820) 2 B. & B. 284, 289.

[8] (1828) 5 Bing. 136, 151.

[9] (1802) 3 B. & P. 188.

[10] (1847) 2 C. & K. 366.

It is true, of course, that the procedure in habeas corpus proceedings is far removed from the present. But if the woman herself—seeking to challenge the legality of her detention in the proper way—can only call for *production* of the orders for her detention, it would seem strange if a third person, seeking to challenge the legality in his own interests, could call for strict proof of them.

The solution to the difficulty is, I think, this: the orders prove themselves by production of the originals from the proper custody. They are the modern successors of the old inquisitions in lunacy. The findings and orders made on such inquisitions were always receivable in evidence by the production of the original record from the proper custody without more ado. Lord Hardwicke so ruled in 1742 (see *Sergeson* v. *Sealey*[15]) and Lord Ellenborough in 1811 (see *Faulder* v. *Silk*[16]) and those cases were applied just over 50 years ago in *Van Grutten* v. *Foxwell*[17] (see *Hill* v. *Clifford*[18]). The inquisition in lunacy has now been replaced by an inquiry by a justice of the peace, a master in lunacy or other public officer. Just as with the old inquisitions in lunacy, so also with these inquiries into defectiveness of mind. The orders made on them are receivable in evidence on production of the original from the proper custody without further proof except to identify the person who was the subject of the inquiry.

The reason why these orders are admissible is because they are in the nature of proceedings in rem. They affect the status of the individual and her capacity. They are made by a competent public officer whose duty it is to hold a judicial or quasi-judicial inquiry and to record his findings. If he finds that the woman is a defective, many public servants will be called upon to take action, some to detain her, others to take charge of her property. It is essential to the orderly and just conduct of business that all these public servants—and anyone else concerned with her affairs—should be able to act on the faith of the orders as they stand; and should not be put to the proof of the correctness of the findings therein—a task which would often be impossible after the lapse of time. They are therefore made admissible in evidence against all the world; see Starkie on Evidence, 3rd ed. (1842), Vol. I, pp. 307–310. An interesting parallel is to be found in the orders made by the Home Secretary during the war for the detention of suspected persons. Lord Wright said: "The order made "by the Home Secretary in the terms of regulation 18B speaks "for itself. It is admissible as a public executive document to "show a good cause of the detention and needs no extrinsic "justification"; see *Greene* v. *Home Secretary*.[19]

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[11] (1839) 9 A. & E. 731, 787–796.

[12] [1942] A.C. 284; 58 T.L.R. 53; [1941] 3 All E.R. 388.

[13] (1854) 3 E. & B. 607.

[14] [1956] 2 Q.B. 109; [1956] 2 W.L.R. 822; [1956] 1 All E.R. 769.

[15] (1742) 2 Atk. 412.

[16] (1811) 3 Camp. 126.

[17] [1897] A.C. 658, 660.

[18] [1907] 2 Ch. 236, 244–245; 23 T.L.R. 601.

Applying this principle, it seems to me that the orders made by a competent authority under the Mental Deficiency Act, 1913, such as the order of a judicial authority under section 6, or of a Secretary of State under section 9, or the continuation orders of the Board of Control under section 11, are admissible in evidence on production of the originals from the proper custody and an identification of the party who is the subject of the order. If the originals are not available, certified copies are often made admissible by statute. Thus, in the case of an order made by a Secretary of State under section 9, a certified copy is admissible under the Documentary Evidence Act, 1868. In the case of the continuation orders, there is no need to produce the originals if the secretary to the board certifies under section 11 (5) that the initial order has been continued.

What, then, does an order of this kind prove when produced from the public custody? It is conclusive proof of its own existence—that is to say, that an order was made as the document says it was—and it is prima facie evidence (but not conclusive evidence) of the truth of the facts recited in it which are essential to its validity: and if uncontradicted, it ought to be regarded as sufficient evidence of those facts; see *Harvey* v. *Rex*,[20] *Hill* v. *Clifford*.[21]

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[19] [1942] A.C. 284, 306.

The result is that in an ordinary case, in order to show that the woman is lawfully detained as a defective, all that the prosecution have to do is to call the medical superintendent to produce the original order for detention and the continuation orders, and in addition, if the woman has been placed out on licence, to prove that fact. That was done in this case and was held by the judge at the trial, Hinchcliffe J., to be sufficient. But it was upset by the Court of Criminal Appeal on the ground that, looking at the other documents which were also produced—but not proved—Miss Henderson was not lawfully detained at all. This brings me to the second point.

The Court of Criminal Appeal have held that Miss Henderson was unlawfully detained for more than 10 years and have severely criticized all those concerned in detaining her. The Attorney-General has challenged this finding. He admitted before your Lordships that the original order for her detention might have been quashed—if the appropriate application had been made for the purpose—but he contended that it stood until it was quashed and, accordingly, that the continuation orders and the licence were good. He cited Lord Radcliffe for his purpose, saying of this order: "It bears no brand of invalidity on its forehead. "Unless the necessary proceedings are taken at law to establish "the cause of invalidity and to get it quashed or otherwise upset, "it will remain as effective for its ostensible purpose as the most "impeccable of orders"; see *Smith* v. *East Elloe Rural District Council*.[22] This contention of the Attorney-General was in effect, though not in terms, a contention that the original order was not absolutely *void*, but only *voidable*: and, as it had not been avoided before the continuation orders were made, these remained good. Even if the original order were quashed today, the continuation orders would still be good.

This is a point of the first importance which, by itself, would justify the Attorney-General in giving his certificate for an appeal to this House. I have thought it right, therefore, to consider it on principle. But first let me state the relevant facts. These all appear on the documents and this House is in as good a position to determine them as the Court of Criminal Appeal.

[His Lordship stated the history of the case up to the order of July 2, 1947, and continued:] If that order is read with section 9 (as it should be) it means that the Secretary of State was satisfied from the certificate of the two doctors that Miss Henderson was a defective. This reference to the medical certificates means that they are to be read with the order as part of the record; see *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore.*[23] And " satisfied " in the Act means reasonably satisfied. If, on reading the medical certificates, no reasonable person would have been satisfied that she was a defective, the order is liable to be quashed.

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[20] [1901] A.C. 601, 611; 17 T.L.R. 601.

[21] [1907] 2 Ch. 236, 244.

[22] [1956] A.C. 736, 769–770; [1956] 2 W.L.R. 888; [1956] 1 All E.R. 855.

What do the medical certificates show? Each doctor said he was satisfied that she was a moral defective, but each stated insufficient facts to warrant this conclusion. One doctor referred to " her conduct," the other to " her behaviour," without going into details. One said she needed care and supervision " for her " own protection," but he did not go on to say that she needed it for the protection of others. The other said nothing about it. It is this defect which rendered the certificates insufficient. The Secretary of State ought not to have acted on them as they stood. He ought to have referred them back to the doctors for further consideration.

In fairness to the medical men, I would pause to say that it does not follow that their diagnosis was wrong. It is notoriously difficult to describe the characteristics of mental defectiveness. A doctor may well be able to diagnose it by his own observation of the patient's behaviour, but he may not be able to portray her behaviour adequately in words. The trouble with the two certificates may be, therefore, not in a faulty diagnosis, but in the bad expression of their reasons. The rest of the girl's history supports this view.

[His Lordship completed the history of the case and continued:] On that history, I ask myself what effect did the initial mistake have on all that followed. Was it the cause of her detention over the next 10 years as the Court of Criminal Appeal seems to have thought? I should have said it was not. The chain of causation was broken at innumerable points just as it was in the celebrated case of *Harnett* v. *Bond.*[24] It was certainly broken on every continuation order. Under the statute the original order lasted only for one year and would then have expired unless a continuation order had been made. Before this was made, there had to be special reports on the girl by the statutory visitors and by the medical officer together with a certificate that she was still a proper person to be detained: and it was only after considering them all that the Board of Control made a continuation order. That first continuation order would itself have expired after five years unless another continuation order had been made after another investigation. And so on, from one continuation order to another, she was only detained as a result of an independent decision freshly made after the most careful reconsideration of her case. These continuation orders were not made by automata with a rubber stamp. They were made by responsible people to whom Parliament had entrusted the task. On a just appraisal of the case, these continuation orders cannot be ignored in point of fact, but can they be ignored in point of law?

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[23] [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; [1957] 1 All E.R. 796.

[24] [1924] 2 K.B. 517, 538–542; 40 T.L.R. 653 (C.A.); [1925] A.C. 669, 682; 41 T.L.R. 509 (H.L.).

Mr. Guthrie Jones said that the original order was bad and that therefore the continuation orders were bad. They depended on the original order which was itself void. Nothing could save the continuation orders, he said, if the original order was bad.

This contention seems to me to raise the whole question of *void* or *voidable*: for if the original order was void, it would in law be a nullity. There would be no need for an order to quash it. It would be automatically null and void without more ado. The continuation orders would be nullities too, because you cannot continue a nullity. The licence to Miss Henderson would be a nullity. So would all the dealings with her property under section 64 of the Act of 1913. None of the orders would be admissible in evidence. The Secretary of State would, I fancy, be liable in damages for all of the 10 years during which she was unlawfully detained, since it could all be said to flow from his negligent act; see section 16 of the Mental Treatment Act, 1930.

But if the original order was only voidable, then it would not be automatically void. Something would have to be done to avoid it. There would have to be an application to the High Court for certiorari to quash it. The application would have to be made by the person aggrieved—Miss Henderson—and not by a stranger: and she would have to make it within six months unless the court extended the time. And being only voidable, the court would have a discretion whether to quash it or not. It would do so if justice demanded it, but not otherwise. Meanwhile the order would remain good and a support for all that had been done under it. See the principles discussed in *Dimes* v. *Grand Junction Canal*,[25] *McPherson* v. *McPherson*.[26] In this case, therefore, if the original order was only voidable, the continuation orders would be good. So would the licence. All dealings with her property would be valid. All the orders would be admissible in evidence (see *Leighton* v. *Leighton*,[27] Hubback on Evidence, pp. 590–591) and the Secretary of State would not be liable in damages; see *Everett* v. *Griffiths*.[28]

The vital question to my mind is therefore: Was the original order absolutely void or was it only voidable? If the order had been outside the jurisdiction of the Secretary of State altogether, it would have been a nullity and void; see *The Case of the Marshalsea*.[29] But that is not this case. The most that appears here is that the Secretary of State—acting within his jurisdiction—exercised that jurisdiction erroneously. That makes his order voidable and not void. It is said that he made the order on no evidence or on insufficient materials. So be it. His error is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not; see *Rex* v. *Nat Bell Liquors Ltd.*[30] by Lord Sumner. If that error appears on the face of the record—as it is said to do here—it renders the order liable to be quashed on certiorari, but it does not make it a nullity; see *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore*[31] by Parker L.J. Unless and until it is so quashed, it is to be regarded as good. It is, moreover, sufficient to support all the continuation orders made on the faith of it. Even if the original order should be set aside, the continuation orders would remain good: for it is a general rule that when a voidable transaction is avoided, it does not invalidate intermediate transactions which were made on the basis that it was good; see *De Reneville* v. *De Reneville*[32] by Lord Greene M.R., and *Reg.* v. *Algar*[33] by Lord Goddard C.J. I would uphold therefore the contention of the Attorney-General that, whatever the position of the original order, the continuation orders were good.

Even if the woman applied for habeas corpus, she would be no better off, because the court, on seeing the continuation orders still standing, would not release her: just as it would not release her if it appeared that there would be danger in setting her at large; see *In re Shuttleworth*.[34]

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[25] (1852) 3 H.L.C. 759, 786.

[26] [1936] A.C. 177, 203–205; 52 T.L.R. 166.

[27] (1720) 1 Str. 308.

[28] [1921] 1 A.C. 631; 37 T.L.R. 481.

[29] (1612) 10 Co.Rep. 68b, 76a.

[30] [1922] 2 A.C. 128, 151; 38 T.L.R. 541.

[31] [1957] 1 Q.B. 574, 588.

[32] [1948] P. 100, 111–112; 64 T.L.R. 82; [1948] 1 All E.R. 56.

[33] [1954] 1 Q.B. 279, 287; [1953] 3 W.L.R. 1007; [1953] 2 All E.R. 138.

Another consequence of the order being only voidable is this: that on a charge under section 56 (1) (*a*), there will be no occasion for a trial within a trial; a trial whether the woman could have got the order quashed, within a trial of the man for the offence. That would be a very undesirable state of affairs, but it will not arise if the order is to be regarded by the trial court as good, as I think it must and as, indeed, Hinchcliffe J. ruled in this present case, I think rightly.

It all goes to show how important it is to keep this distinction between void and voidable in mind, especially in the case of mental patients. There are many cases in the books where mistakes have been made by medical men in filling in the certificates leading to detention orders. Sometimes it happens through an oversight, sometimes through carelessness, sometimes through misapprehension as to the legal obligation. Very often it is a highly technical ground; see *Murray* v. *Murray*[35] by Greene M.R. If these orders were on such a ground to be absolutely void it would lead to much injustice in the law of divorce, the law of tort, and so forth: whereas if they are only voidable, there is no such injustice.

It is the failure to keep this distinction in mind which has led to the difficulties in the present case. Instead of considering whether the original order was void or voidable, the Court of Criminal Appeal considered whether it was valid or invalid, and having held it invalid, they held that the woman was unlawfully detained: whereas they should have held it was only voidable, and not having been avoided, the detention of Miss Henderson at the material time was lawful. In quashing the conviction, therefore, they acted on a mistaken ground.

But that is not quite the end of the matter. There is another point. Is it right that the conviction should be restored? The decision of the Court of Criminal Appeal was founded on admissions made by the prosecution. I cannot think that the distinction between void and voidable was made clear to the court. I would not allow the prosecution to clarify it here at the expense of the accused so as to obtain a conviction. But I would allow them to clarify it in the public interest. When a man has been acquitted by an English court, it is altogether exceptional for

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[34] (1846) 9 Q.B. 651.

[35] [1941] P. 1, 8–9; 56 T.L.R. 955; [1940] 4 All E.R. 250.

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the prosecution to be allowed to appeal from the acquittal. Parliament has only allowed it here so as to enable a ruling to be obtained on a point of law of exceptional public importance. When the Attorney-General comes to this House, seeking for such a ruling, I would myself try to give him an answer: and this I have done. But I would not on this account restore the conviction if it was not fair to do so, having regard to the course of proceedings in the court below.

On this ground I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Director of Public Prosecutions; Ludlow, Head & Walter.*

F. C.

J. C.*
1958
Dec. 1.

GOKULDAS RATANJI MANDAVIA . . . . APPELLANT;
AND
COMMISSIONER OF INCOME TAX . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Revenue — Income tax — Assessment — Eastern Africa — Made before expiry of time for furnishing return—Ultra vires and void—East African Income Tax (Management) Act, 1952, *ss.* 59 (1), 71 (1), 72. *Eastern Africa (Kenya)—Income tax.*

By section 59 of the East African Income Tax (Management) Act, 1952: "(1) The commissioner may, by notice in writing, "require any person to furnish him within a reasonable time, not "being less than thirty days from the date of service of such notice, "with a return of income . . ."

By section 71: "(1) The commissioner shall proceed to assess "every person chargeable with tax as soon as may be after the "expiration of the time allowed to such person for the delivery of "his return."

By section 72: "Where it appears to the commissioner that any "person liable to tax has not been assessed . . . the commissioner "may . . . assess such person at such amount . . . as, according to "his judgment, ought to have been charged . . ."

On May 26, 1953, the appellant, a resident in Kenya, was for the first time served with a notice under section 59 (1) of the Act of 1952 requiring him to furnish returns of his income for the years of assessment 1943 to 1953. He was then in England and wrote to the commissioner asking for time until he returned to Kenya towards the end of July. In those circumstances the commissioner on or before June 18 made assessments on the appellant under section 72 of the Act of 1952 for the years 1943 to 1951 inclusive on the basis of figures already submitted. The appellant contended that section 72 did not apply until the machinery under section 71 had been put into operation, and that the assessments were ultra vires and void in that they were made before the "time allowed" by section 71—which was admittedly the 30 days provided by section 59 (1)—had expired:—

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* *Present*: Lord Tucker, Lord Somervell of Harrow and Lord Denning.

Held, that section 71 was providing how all original assessments were to be made, whereas section 72 was concerned with the reopening of cases which had been settled under the normal procedure. Having regard to the wording of section 71, it was necessary to restrict the words as to assessing for the first time in section 72 to cases in which, the machinery of section 59 (1) having been operated, no assessment had been made. Accordingly, before making the assessments on the appellant the "time allowed" under section 71 had to elapse, and since it did not the assessments must be set aside.

Order of the Court of Appeal for Eastern Africa (1956) 23 E.A.C.A. 303 reversed.

APPEAL (No. 7 of 1957) from a judgment of the Court of Appeal for Eastern Africa (September 28, 1956) which varied, on the appellant's appeal, a decree of the Supreme Court of Kenya (March 6, 1956) which had dismissed the appellant's appeal against assessments to income tax for the years 1943 to 1951, subject to remitting treble additional tax for the year of assessment 1951.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: Over the earlier years in issue in this case the Kenya Income Tax Ordinance, 1940, was in force. As from January 1, 1951, that Ordinance was replaced by the East African Income Tax (Management) Act, 1952. It was common ground that there was no relevant difference so far as the present case was concerned and the Board were referred, as were the courts below, to the sections of the 1952 Act.

It is convenient to set out sections 40 (1), (2) and (3), 59 (1) and (3), 71 and 72 before coming to the facts.

Section 40 of the Act provided: "(1) Any person who—(*a*) "makes default in furnishing a return, or fails to give notice "to the commissioner as required by the provisions of section 59, "in respect of any year of income shall be chargeable for such "year of income with treble the amount of tax for which he is "liable for that year under the provisions of sections 36 to 39 "inclusive; or (*b*) omits from his return for any year of income "any amount which should have been included therein shall be "chargeable with an amount of tax equal to treble the difference "between the tax as calculated in respect of the total income "returned by him and the tax properly chargeable in respect of "his total income as determined after including the amounts "omitted, and shall be required to pay such amount of tax in "addition to the tax properly chargeable in respect of his true "total income. (2) If the commissioner is satisfied that the "default in rendering the return or any such omission was not "due to any fraud, or gross or wilful neglect, he shall remit the "whole of the said treble tax and in any other case may remit "such part or all of the said treble tax as he may think fit. "(3) The additional amounts of tax for which provision is made "under this section shall be chargeable in cases where tax has "been assessed by the commissioner under the provisions of "section 72 as well as in cases where such income or any part "thereof is determined from returns furnished."

Section 59 (1) of the Act provided: "The commissioner may, "by notice in writing, require any person to furnish him within "a reasonable time, not being less than thirty days from the "date of service of such notice, with a return of income and of "such particulars as may be required for the purposes of this Act "with respect to the income upon which such person appears to "be chargeable."

Section 59 (3) of the Act provided: "Where any person "chargeable with tax has not furnished a return within nine "months after the end of the year of income, it shall be the duty "of every such person notwithstanding that no notice has been "served upon such person under subsection (1) to give notice to "the commissioner before the 15th October in the year following "the year of income that he is so chargeable."

Section 71 of the Act provided: "(1) The commissioner shall "proceed to assess every person chargeable with tax as soon as "may be after the expiration of the time allowed to such person "for the delivery of his return. (2) Where a person has delivered "a return, the commissioner may—(*a*) accept the return and "make an assessment accordingly; or (*b*) if he has reasonable "ground for thinking that the return is not a true and correct "return, refuse to accept the return and, to the best of his "judgment, determine the amount of the income of the person "and assess him accordingly. (3) Where a person has not "delivered a return and the commissioner is of the opinion that

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"such person is liable to tax, he may, according to the best of "his judgment, determine the amount of the income of such "person, and assess him accordingly, but such assessment shall "not affect any liability otherwise incurred by such person by "reason of his failure or neglect to deliver a return."

Section 72 of the Act provided: "Where it appears to the "commissioner that any person liable to tax has not been assessed "or has been assessed at a less amount than that which ought "to have been charged, the commissioner may, within the year "of income or within seven years after the expiration thereof, "assess such person at such amount or additional amount as, "according to his judgment, ought to have been charged, and "the provisions of this Act as to notice of assessment, appeal "and other proceedings under this Act shall apply to such assessment or additional assessment and to the tax charged thereunder:—Provided that (*a*) where any fraud or wilful default "has been committed by or on behalf of any person in connexion "with or in relation to tax for any year of income, the commissioner may, for the purpose of making good to the revenue of "the Territories any loss of tax attributable to the fraud or "wilful default, assess that person at any time; (*b*) an objection "to the making of such assessment or additional assessment on "the ground that the time limited for the making thereof has "expired shall only be made on objection or appeal as provided "for under the provisions of this Act."

On the view which the Board took in this appeal no question as to penalties arose at present. It was therefore undesirable to deal with facts which on that issue might hereafter require consideration.

The appellant had been resident in Kenya since 1921. According to his own statement he approached the Revenue authorities in 1943. This was disputed, but it was not disputed that prior to 1953 he was not served with notices under section 59, nor did he make returns of his income. The appellant in 1950 gave oral notice to the respondent that he was chargeable in respect of 1950 and the previous eight years. As a result of that interview there was correspondence and information was asked for and some of it given. The machinery of the Act was not set in motion until May 26, 1953. On that day the respondent wrote asking for information and a deposit of £2,000. The letter also contained the following paragraph: "As you do not appear at "any time to have made a return of total income and claim for "allowances, I am sending under separate cover forms covering "years of assessment 1943 to 1953. These should be completed "and submitted to me along with the accounts of your professional activities and of your property dealings as set out in "preceding paragraphs."

No previous notice requiring a return having been sent, the "time allowed" within section 71 would be the minimum of 30 days in accordance with section 59 (1). The appellant was at that time in England and replied asking for time until he could get back to East Africa, which might be by the end of July. The answer to this letter was as follows:

"Ref. No. 70.

"E.A. Income Tax Department,
"Nairobi,
"15th June, 1953.

"Mr. G. R. Mandavia,
"68, St. Mark's Road,
"London, W.10.

"Dear Sir,

"I have to thank you for your letter of the 4th June, and "have noted your explanation concerning your absence from "Kenya. I have further noted that there is no prospect of your "being able to return before the end of July next. In these "circumstances, and in order that there may be no undue delay "in collection of duty, I propose to submit estimated income tax "assessments for all years for which, on the basis of the figures "which you have already submitted, you would appear to be "liable. These assessments will, of course, be subject to adjustment on final agreement of liability.

"In view of the fact that you were clearly liable and must "have been aware of the fact that you were liable to taxation for "a considerable period before any approach was made to this "department, I propose to have the assessments made with the "addition of penalties. The quantum of the penalties will also "be subject to adjustment at the discretion of the commissioner "when your liability has finally been established.

"The notices of assessment will be issued to your Nairobi "address and you will presumably be advised of their receipt "and be able to give formal notice of appeal if you so desire.

"I am unable to agree that you are not in a position to pay "any deposit. On your own showing you have substantial properties in Nairobi, from which presumably you could obtain "funds. In these circumstances I would repeat my request for "a payment on account of £2,000. If this is sent to me at this "address, it will be brought to account against the estimated "assessments which it is proposed to raise, and final payment "will be adjusted at a later date.

"Yours faithfully,
"REGIONAL COMMISSIONER."

The assessments referred to were made on or before June 18. They were post-dated June 26, but nothing turned on that. Assessments were often post-dated to allow the taxpayer more time.

The taxpayer submitted that these assessments were ultra vires and void in that they were made before the "time allowed" by section 71 had expired. This was admitted by the respondent if the power to make these assessments had to be found under that section. The respondent justified the assessments under the words of section 72, "Where it appears to the commissioner "that any person liable to tax has not been assessed . . . the "commissioner may . . . assess such person at such amount ". . . as, according to his judgment, ought to have been charged."

The assessments contained triple penalties under section 40 in addition to the tax. Being made under section 72 the proviso was relied on as justifying those assessments which related to years more than seven years from the time of the assessments.

Both courts below held that the assessments were properly made under section 72. The judge (Cram Actg. J.) remitted the triple penalties for 1951 because the appellant had given notice of his liability to tax for that year and supplied some figures. The appellant appealed. The Court of Appeal (Worley P., Sinclair V.-P. and Briggs J.A.) confirmed the assessments in respect of the tax and a penalty equal to the amount of the tax. As regards the further penalties the court remitted them to the Supreme Court for retrial by another judge.

1958. Oct. 13, 14, 15. *Dingle Foot Q.C.* and *Peter Rowland* for the appellant. The main contention is that the commissioner proceeded under the wrong section and that these were unlawful assessments. Having set in motion section 71, the commissioner was not entitled to turn round before the time limit of 30 days had expired and proceed to assess the appellant under section 72. The submissions are: (1) The commissioner cannot assess under section 71 (3) until the expiry of the time allowed under subsection (1), which is the 30 days provided by section 59 (1).

Section 71 simply applies to a case, not where there has been an oversight, but where the assessee has been requested to furnish a return. Section 71 (3) cannot operate until the time has expired. (2) Section 72 is only supplementary to section 71; it is not a substitute, and it only applies after the machinery of section 71 has been put into operation or, alternatively, where it cannot be put into operation. The Act clearly contemplates a certain course of proceedings. Section 71 is mandatory and the commissioner must proceed to assess under section 71 (1)—which has to operate in one way or another before section 72 comes on the scene at all. (3) Where somebody is leaving the territory and there is not time to operate the machinery of section 71—a situation which may constantly arise in these territories—then sections 71 and 72 are alternatives, and the commissioner may use one or the other, but he cannot use both at the same time, and here the appellant was served with a notice under section 59 (1), and section 71 operates. On the point that the two sections cannot be operated at the same time, see *Gould* v. *Bacup Local Board* [1] and *Bedford and Cambridge Railway Co.* v. *Stanley.*[2]

The correct way of looking at the matter, however, is the first way, and the machinery of section 71 must operate in every case before the commissioner can use section 72. Section 71 is all-embracing; the assessee either makes a return or he does not, and, if not, he is assessed under subsection (3) of section 71. [Reference was also made to *Drummond* v. *Collins*,[3] *Astor* v. *Perry*; *Duncan* v. *Adamson* [4] and *Russell* (*Inspector of Taxes*) v. *Scott.*[5]]

Peter Rowland following. Section 72 is supplementary to section 71 and is of very limited application; it fills a gap. If the commissioner thought that the appellant might not return to the country, he could assess under section 84 (2); that takes away any need for section 72 to cover this kind of case.

Heyworth Talbot Q.C. and *Roderick Watson* for the respondent. There is, from the scheme of the Act and the relevant sections, a fairly clear implication of a time schedule. Section 71 is obviously apt and necessary for the routine of the general administration of the tax. Section 72, it is submitted, is prescribing special rules for special cases. While not saying that section 72 is not wide enough to make it applicable to cases other than special cases, it is really directed to the latter. It shows that the draftsman had in front of him the income tax scheme of the United Kingdom: see the Income Tax Act, 1918, of the United Kingdom, ss. 98, 99, 100, 107, 120, 121, 122, 125—the parentage of the East African legislation seems fairly obvious. One of the beads on the thread of routine is section 71; and then one finds that section 72, as in the case of section 125 of the United Kingdom Act, is designed to deal with special cases. It is designed to meet the case which crops up late, and it is not surprising that a provision of that kind should be framed in very wide terms—it had to be wide because of the unknown possibilities; it is designed to stop any gaps there may be. In cases where there has been fraud or wilful default the commissioner is not to be limited as to time in making an assessment. Section 72 was designed to deal with the back year cases; section 71 was never intended to be used for such cases and cannot be appropriate to such a case as this. It is not, however, a question of whether an out of time assessment could be made under section 71, but whether the making of the assessments in question under section 72 is invalid. Section 72 is not confined in its operation to instances in which the taxpayer has made a return, and may properly be applied where no return has been made. The appellant was properly assessed under section 72.

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[1] (1881) 50 L.J.M.C. 44, 47.

[2] (1862) 2 J. & H. 746.

[3] [1915] A.C. 1011, 1017; 31 T.L.R. 482.

[4] [1935] A.C. 398, 417; 51 T.L.R. 325.

[5] [1948] A.C. 422, 433; 64 T.L.R. 297; [1948] 2 All E.R. 1.

Dingle Foot Q.C. in reply. As to the respondent's reliance on the United Kingdom legislation being the parent of the East African Act, see *Income Tax Commissioner* v. *Shaw, Wallace & Co.*[6] The East African Act is concerned with wholly different circumstances. One cannot assume that it was ever intended by the legislature that section 71 should operate within a 12 months' period. Section 71 is the normal section which has to be put into operation in every case. Section 72 must be read in the light of section 71, and is qualified by it.

December 1. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW, who stated the facts set out above and continued: The question of ultra vires is a difficult one and their Lordships have been much assisted by counsel on each side. The appellant before the Board submitted that: (1) section 72 did not apply until the machinery under section 71 had been put into operation and that the assessments were therefore ultra vires; (2) alternatively, that if sections 71 and 72 were alternatives, the respondent had elected to give notice under section 59 and could not then operate section 72 during the currency of the " time allowed "; (3) that the Court of Appeal had not judicially considered the question of wilful default or neglect under sections 40 and 72, or, alternatively, that in any event the whole sum assessed as penalties should be remitted to the Supreme Court.

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[6] (1932) L.R. 59 I.A. 206.

If he succeeds on his first submission points (2) and (3) do not arise. The arguments on the first point may be summarized as follows. The appellant submitted that section 71 (1) lays down the procedure which has to be followed in all cases. The words " time allowed," and this is not disputed, refer to the time allowed for the furnishing of the return under section 59 (1). If, therefore, the commissioner believes someone to be assessable or possibly assessable he must serve a notice. If a return is made and is accepted the commissioner proceeds under section 71 (2) (*a*). If he does not accept the return, then he proceeds under section 71 (2) (*b*). If no return is delivered, then section 71 (3) applies. In no case can he assess until the " time allowed " has expired.

There may be cases in which the return and particulars show that no tax is chargeable and no assessment is therefore made. The return is accepted or not disputed but does not lead to an assessment.

Coming then to section 72, it is submitted for the appellant that the cases in which the person has not been assessed will be those referred to in the last paragraph, but in which at some later date additional information makes it appear to the commissioner that an assessment ought to have been made. In other words, section 72 is dealing only with cases where subsequent information leads either to an assessment for the first time or to an additional assessment. It has no application to cases in which the machinery of section 59 (1) has not been operated.

The respondent relies on the general words of section 72. They cover, he submits, any case in which a person has not been assessed whether he has had a notice and a " time allowed " under sections 59 and 71 or not. He conceded that it would be contrary to the scheme of the Act to operate section 72 in current cases. Sections 59 and 71 were clearly intended to be the normal machinery. But if a year or longer had elapsed following the year of income section 72 was properly available. It seemed impossible to formulate any precise limit of time before which the use of section 72 would be ultra vires. The Court of Appeal accepted the argument that the two sections overlap over the whole period[1]: "If the department were to abandon altogether "the practice of requiring returns to be made, and began to assess "in every case by guesswork under section 72, the courts might "not be slow to say that the powers given by the Act were being "abused. But where powers given to a department of Government, or other statutory authority, are capable of being, through "perversity, misused, it does not follow that they are likely "to be misused, and much less does it follow that they should "be construed in an unnaturally restricted sense merely because "of the theoretical danger of misuse."

Their Lordships have come to the conclusion that the construction submitted by the appellant is right for the following reasons. If the power to make an assessment under section 72 applies to the making of an original assessment their Lordships are unable to imply a term restricting it to back cases or making it ultra vires to operate it at any time. One would expect an opportunity to make a return to be a condition precedent to assessment. This is supported by the provisions for personal allowances in Part VI of the Act. If the respondent is right any person can be assessed without having any such opportunity. There would be two concurrent jurisdictions, one providing reasonable protection for the taxpayer and the other providing no protection quoad the original assessment, apart from a right to appeal. Such a construction seems to their Lordships inconsistent with the general and mandatory provisions of section 71. That section is providing how all original assessments are to be made.

Section 72 deals, inter alia, with additional assessments, with cases in which, owing presumably to subsequent information, the Revenue desires to reopen what had apart from section 72 been settled. Having regard to the wording of section 71 it seems to their Lordships necessary to restrict the words as to assessing for the first time in section 72 to cases in which, the machinery of section 59 (1) having been operated, no assessment has been made. So far as the taxpayer is concerned, after he had made his return or had an opportunity of doing so, it was settled that he was under no liability to tax for that year. Subsequent information leads the Revenue to reopen the matter and decide that he ought to be assessed.

Section 72 is dealing with the reopening of cases which had been settled under the normal procedure. This explains the fact that section 72 contains a prima facie limitation of seven years whereas section 71 contains no limitation. On the respondent's argument this seems inexplicable. On the other argument it seems reasonable that there should after a certain time be no reopening of what has been settled unless there has been fraud or wilful default.

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[1] (1956) 23 E.A.C.A. 303, 310.

The construction also gains support from the words "ought "to have been charged," when they occur for the second time in section 72. They there apply to "such amount" as well as "such additional amount."

Before making the assessments, therefore, the "time allowed" under section 71 had to elapse. It is common ground that it did not and their Lordships will humbly advise Her Majesty that the appeal be allowed and the assessments set aside. The respondent must pay the appellant's costs throughout.

Solicitors: *A. L. Bryden & Williams; Charles Russell & Co.*

C. C.

J. C.*
1958
Dec. 1.

MOHAMED HAJI ABDULLA AND ANOTHER . APPELLANTS;

AND

GHELA MANEK SHAH AND OTHERS . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Vendor and Purchaser—Contract—Sale of rent-restricted property—Surrender of tenancy between contract and completion—Duty of vendor not to relet without consulting purchaser—Indian Transfer of Property Act (IV of 1882), *s.* 55 (1) (*e*)*—English principles applicable.*

Eastern Africa (Kenya)—Vendor and purchaser.

A vendor of rent-restricted property which has become vacant between the dates of the contract and of completion is under a duty to consult the purchaser before reletting before completion of the contract.

After the appellants had entered into an agreement to sell to the respondents property in Nairobi consisting of three shops let to three tenants at rents controlled under the local rent restriction legislation, one of the tenants surrendered his tenancy before completion of the contract. The appellants, without consulting the respondents, relet the vacated shop on the same day to another tenant at the same maximum controlled rent. The evidence established that, owing to shortage of accommodation, the value of the premises with the vacated shop unlet was Shs. 18,000/– more than with the shop let. The appellants being unwilling to compensate the respondents in respect of the depreciation in value of the premises resulting from the reletting, the respondents claimed specific performance of the agreement and compensation by way of an abatement of the purchase price for the loss resulting from the reletting:—

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* *Present*: LORD REID, LORD COHEN, LORD SOMERVELL OF HARROW.

Held, that the vendors' obligations were defined in section 55 (1) (*e*) of the Indian Transfer of Property Act, 1882, as applied to Kenya, which provided that the seller was bound " between the date " of the contract of sale and the delivery of the property to take as " much care of the property . . . as an owner of ordinary prudence " would take of such property. . . ." The words " take . . . care " of the property " were not restricted to the preservation of the property from physical deterioration, but included care in its management having regard to the interests of the purchaser. On that view the obligations imposed by section 55 (1) (*e*) were substantially those imposed on the vendor under English law, and the vendors here had no right, without consultation with the purchasers, to diminish the value of the property as it was after the surrender by reletting. The respondents were therefore entitled to a decree for specific performance and an abatement of Shs. 18,000/– from the purchase price.

Dictum of Sir George Jessel M.R. in *Egmont* (*Earl of*) v. *Smith* (1877) 6 Ch.D. 469, 476 applied.

Order of the Court of Appeal for Eastern Africa (1956) 23 E.A.C.A. 342 affirmed.

APPEAL (No. 10 of 1957) from an order of the Court of Appeal for Eastern Africa (October 13, 1956) dismissing an appeal by the present appellants and allowing a cross-appeal by the respondents from a judgment of the Supreme Court of Kenya (February 18, 1954).

The following facts are taken from the judgment of the Judicial Committee: The plaintiffs, the present respondents, claimed specific performance of an agreement in writing dated December 6, 1951. The agreement was for the sale by the defendants, the present appellants, to the plaintiffs of certain land and buildings at River Road, Nairobi. The plaintiffs' claim for specific performance was made subject to an abatement of the purchase price by reason of an alleged breach of duty or contract by the defendants.

The only question in the appeal was whether the respondents, hereinafter called the purchasers, were entitled on completion to compensation by way of an abatement of the sum to be paid to the appellants, hereinafter called the vendors, to complete the purchase.

The material provisions of the agreement were as follows:

"MEMORANDUM OF AGREEMENT OF SALE OF THE
"UNDER-MENTIONED PROPERTY BETWEEN THE
"PARTIES HEREUNDER MENTIONED UPON TERMS
"SPECIFIED BELOW

"1. Name of the vendors:—MOHAMED HAJI ABDULLA and "(2) AHMED HAJI ABDULLA.

"2. Name of the purchaser:—KHETSHI GHELABHAI [as agent "for the respondents].

"3. Description of property:—Plot known as L.R. No. 209/ "502 situate at River Road, Nairobi, together with the building "standing thereon which is rented by (1) Hiragar Motigar (2) "Velji Ravji, Barber (3) Deva Naran, Shoemaker, Free from "encumbrances.

"4. Purchase price:—Shs. 125,000/– (Shillings One hundred "and twenty five thousand only).

"5. Deposit against purchase price made on the signing here"of:—Shs. 25,000/– (Shillings Twenty five thousand only).

"6. Balance of purchase price:—Shs. 100,000/– (Shillings "One hundred thousand only) to be paid on or before March 31, "1952, against execution of a proper conveyance by the vendors "in favour of the purchaser, his nominee or nominees.

"7. Conveyance:—To be prepared by an advocate named by "the purchaser, their nominee or nominees. Cost of such advo"cate, stamping and registering the conveyance to be borne by "the purchaser.

"10. Rent and rates:—The purchaser is entitled to one-fifth of "the net rent from the date hereof to the date of execution of a "proper conveyance. The vendors are liable to pay municipal "rates and ground rent only up to the date of execution of proper "conveyance.

"Dated at Mombasa this 6th day of December, 1951."

On February 16, 1952, prior to the execution of any conveyance one of the tenants, Velji Ravji, surrendered his tenancy of the part of the building let to him. On the same day, without consultation with the purchasers, the vendors relet the vacated part of the building to a new tenant at the same rent. Under the rent restriction legislation in force at the time the rent under the new lease was the maximum rent. Owing to the shortage of accommodation the premises with Velji Ravji's part vacant were worth

Shs. 18,000/– more than with that part let. The purchasers claimed that this sum should be deducted from the purchase price or awarded as damages.

Before the trial judge (Bourke J.) the purchasers succeeded. Owing to a misunderstanding as to an agreement between counsel judgment was entered for Shs. 18,000/– as damages and not for specific performance with an abatement of the purchase price. This led to a notice of motion for a review of the judgment. This was dismissed and the purchasers by a cross-appeal asked for a variation of the judge's order by substitution of an order for specific performance on payment of the agreement price less the deposit, less the Shs. 18,000/– and less taxed costs.

The vendors' appeal was dismissed and the cross-appeal in substance allowed by the Court of Appeal (Sinclair Ag.-P., Briggs and Bacon JJ.A.).

1958. Oct. 21, 22. *H. E. Francis* for the appellants. The one point of substance is whether the respondents are or are not entitled on completion of their purchase to compensation by way of an abatement of the purchase price by reason of the fact that the appellants, having before the time fixed for completion received a surrender of the existing tenancy of part of the premises, elected without reference to the respondents to relet that part on the same day to another (protected) tenant at the same rent, thereby depriving the respondents as purchasers of the additional value which would have attached to the premises if transferred with vacant possession of the part relet. The first point is that there is nothing in the contract which imposed any duty on the sellers in the circumstances which arose not to relet. A vendor must not by his own voluntary act render his ownership of the property less efficient to the purchaser than it was at the date of the contract. Prima facie, it was not only a right but a duty to relet the vacant shop. It was never proved that if the purchasers had been told of the vacancy they would have said "do not relet." The respondents must have had in mind the ownership as enjoyed at the date of the contract, and so long as the vendors could give to the purchasers that which they had contracted to buy they had no right of complaint. There was no obligation, either express or implied, to consult the respondents before reletting. The parties really contracted on the assumption that the tenancies would continue; and if the purchasers wished to stipulate that a tenancy coming to an end should remain vacant they should have done so expressly. [Reference was made to *Lake* v. *Dean.*[1]] It was said in *Cook* v. *Taylor*[2] that "Where a contract is silent as to vacant possession, and silent "as to any tenancy to which the property is subject, there is "impliedly a contract that vacant possession will be given on "completion." That is not the case here; it was never suggested that the respondents attached any significance to the identity of the particular tenant.

In *Egmont (Earl of)* v. *Smith*[3] Sir George Jessel M.R. held that under the general law it was the duty of the vendor to relet, and that that duty arose by reason of the fact that he was a trustee. That relationship, however, has no application in Kenya; section 54 of the Indian Transfer of Property Act, 1882, as applied to Kenya, says in terms that the contract of sale does not of itself create any interest in or charge on the property; that section does make it impossible to hold that the relationship of vendor and purchaser is that of a trustee and beneficiary. Any duty analogous to that of trustee to beneficiary must be found in the contract—and it is not found there—or in section 55 (1) (*e*) of the Act of 1882, which provides that: "The seller is bound ". . . (*e*) between the date of the contract of sale and the "delivery of the property to take as much care of the property ". . . as an owner of ordinary prudence would take of such "property . . ." It is said in Mulla's Indian Transfer of Property Act, IV of 1882, 2nd ed. (1936), p. 291: "This subsection [s. 55 "(1) (*e*)] imposes on him the same duties as are imposed upon "a trustee by section 15 of the Trusts Act. The English law "imposes the same liability." Section 15 of the Indian Trusts Act, however, does not apply in Kenya, and it is submitted that it does not throw any light on the scope of section 55 (1) (*e*) of the Transfer of Property Act. [Reference was also made to Mulla, pp. 279, 300 and 307 in relation to section 54, section 54 (4) (*a*) and section 55 (5) (*c*) respectively, and also Gour's treatise on The Law of Transfer in British India, 4th ed., vol. 1, pp. 608, 614, 653, 688 and 1001.]

The Transfer of Property Act is exhaustive, and therefore one must find within its four corners a provision which imposes an obligation on the facts of this case not to relet the property without consulting the purchasers. The words "take . . . care of" in (*e*) mean to preserve the property for physical continuation, that is, to maintain the property by necessary repairs, to protect it from trespassers, and, if it is agricultural land, maintain it in a proper state of cultivation. Between the date of the contract and that of completion the vendor is the owner, and that must confer on him some rights of ownership—he is unquestionably bound to bear losses. One has to strike some balance between the vendor and the purchaser, and the only way of doing that is by looking at the position as at the date of the contract and seeing what the buyer has contracted to buy. Briggs J.A. in his judgment below said: "In general, I think the sellers must "keep the property in the condition most advantageous to "the buyers." That, it is submitted, is not supported by the passage in Williams on Vendor and Purchaser, 4th ed., p. 552, to which the judge referred. Reliance is placed on the words in that passage: "the vendor is bound, while he remains in posses-"sion of the property sold, to take reasonable care to preserve "the property in the same condition in which it was at the date "of the contract for sale."

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[1] (1860) 28 Beav. 607.

[2] [1942] Ch. 349, 352; 58 T.L.R. 278; [1942] 2 All E.R. 85.

[3] (1877) 6 Ch.D. 469.

In summary: (1) The alleged duty to consult before reletting can only be found either in the terms of the contract—impliedly —or in the Act. (2) The subject-matter of the contract was property which was fully let, and the parties contemplated that these lettings would continue until completion. As regards any implication of care in the contract, the court should be slow to import implied obligations or rights when there is a statute which purports to impose certain rights and obligations on the parties. (3) The duty created by section 55 (1) (*e*) of the Act relates only to the physical preservation of the property; but even if it is wider in scope, the duty is only to use such care as an owner of ordinary prudence would show in the given circumstances. (4) Here the sellers were in a position to give the buyers what they bargained for—a property fully rented on terms known to them at the date of the contract.

Raymond Walton and *Gerald Harris* for the respondents. The appellants were under a duty not to relet the property without consulting the respondents as to their wishes in the matter and giving them an opportunity of agreeing terms on which the shop could be kept vacant. Quite apart from the construction of this special contract, it is provided by section 55 (1) (*e*) of the Act of 1882 that the seller is bound between the date of the contract and delivery of the property to take as much care of it as an owner of ordinary prudence would take. That is not a duty in vacuo. The standard of the duty of care which is owed is precisely that which the vendor owes to the purchaser under

English law, but which in English law is founded directly on the theory of trustee and beneficiary. It is, it is submitted, no accident that the words of section 55 (1) (*e*) of the Transfer of Property Act are very similar to those of section 15 of the Indian Trusts Act, 1882, though, of course, the latter Act does not apply in Kenya. For the duty of a trustee, see *Wilson* v. *Clapham*[4]; and in Williams on The Contract of Sale of Land (1930), it is said at p. 55: "Pending the completion of the purchase the "vendor shall manage and preserve the property with the same "care as a trustee is bound to use with regard to the property "subject to his trust." The nature of the duty in the present case is exactly the same, and, if that is so, the whole of the English authorities on it are applicable, and particularly *Egmont* v. *Smith*.[5]

This case falls fairly and squarely within section 55 (1) (*e*), and not to relet was a duty of care which the vendors owed to the purchasers. If that be wrong, there is a lacuna of some description in the Act, and in the circumstances it is right and proper to imply a term. The appellants were under a duty to keep the property in the condition most advantageous to the respondents, and they failed in that duty. With regard to the contract: the property was let to three tenants, and it is submitted (1) that the vendors are claiming a right under the contract to substitute another tenant, and they are not entitled to do that; (2) that even assuming that that is not right, the contract is still silent as to what is to happen if one of the tenants drops out; at the very least that is a lacuna and it must be filled up in some way, and that is by an implied term that the purchasers must be consulted before the vendors relet. The appellants were under a duty to take all reasonable steps to ensure that on completion there would pass to the respondents the benefit of all improvements in, or increase in value of, the property occurring between the dates of the contract and completion, and they have failed in that duty.

H. E. Francis replied.

December 1. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW, who stated the facts set out above and continued: The purchasers submit that the vendors committed a breach of duty owed to the purchasers by reletting without consulting them. The purchasers admit that the vendors were interested in four-fifths of the rent until completion, and

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[4] (1819) 1 Jac. & W. 36.

[5] 6 Ch.D. 469.

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that the purchasers would be bound to indemnify them for this loss arising from the premises being kept vacant. It was accepted in the courts below that if the purchasers had been consulted they would have wished the premises to remain vacant, and would have been willing to pay the loss of rent or allow it to be deducted from their one-fifth share. It would not have amounted to more than £10 or £15.

The case depends on the duty owed by a vendor to a purchaser after contract but before completion.

By article 11 (*b*) of the East Africa Order in Council, 1897, the provisions of the Indian Transfer of Property Act, 1882, as amended, prior to November 27, 1907, were made part of the law of Kenya. It is provided by section 54 that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. This negatives the English principle under which a contract for sale confers an equitable title on the purchaser. That principle being negatived the vendor's obligations, if any, must be sought elsewhere. They are dealt with in section 55 of the Act. The first argument arises on section 55 (1) (*e*).

" 55. In the absence of a contract to the contrary, the buyer " and the seller of immovable property respectively are subject " to the liabilities, and have the rights, mentioned in the rules " next following, or such of them as are applicable to the property " sold:—

" (1) The seller is bound . . . (*e*) between the date of the " contract of sale and the delivery of the property to take as much " care of the property and all documents of title relating thereto " which are in his possession as an owner of ordinary prudence " would take of such property and documents."

The vendors submit that the words " take . . . care of " should be limited to protecting the property from physical deterioration; that they remained owners and were entitled to relet; that the subject-matter of the contract was a property fully let and that the vendors have always been ready and willing to convey the property fully let; that if the purchasers had desired some right of control or consultation if the whole or part of the premises became vacant then they should have so stipulated in the contract; that therefore no duty of consultation in the circumstances arose under section 55 (1) (*e*), nor can any such duty be implied.

The purchasers submitted in the first place that the words " take . . . care of the property " should be given a wide meaning.

Their Lordships reject the submission that the words "care "of the property" are restricted to the preservation of the property from physical deterioration. They include care in its management having regard to the interests of the purchaser. On this view the obligations imposed by section 55 (1) (*e*) are substantially those imposed on a vendor under English law.

The Court of Appeal cited with approval the opinion of Mulla and Gour in their textbooks on the Indian Act that the vendor's duties to a purchaser under paragraph (*e*), although he is not a trustee, are the same as they would be if section 15 of the Indian Trusts Act, 1882, were applicable. That section reads as follows: "15. A trustee is bound to deal with the trust property as care- "fully as a man of ordinary prudence would deal with such "property if it were his own; and in the absence of a contract to "the contrary a trustee so dealing is not responsible for the loss, "destruction, or deterioration of the trust property." This is substantially the position of a trustee in relation to property under English law. Their Lordships therefore agree with the courts below that English principles and authorities are relevant and of assistance.

On this basis it seems plain that the vendors had no right without consultation with the purchasers to diminish the value of the property as it was after the surrender by reletting.

Reliance was placed by the Court of Appeal on a passage in *Egmont* v. *Smith*.[1] In that case Sir George Jessel M.R. considered the position if after contract and before completion a tenancy came to an end. The land was agricultural land. The Master of the Rolls said this[2]: "I have no doubt whatever that, "on the general law, the duty of a trustee is to let the farms from "year to year in order to obtain sufficient rent, and to keep the "farms in a good state of cultivation. That, I have no doubt, is "the general law. Whether the vacancy happen in the ordinary "course of determining the tenancy either by the landlord or the "tenant, or whether the vacancy happen because the landlord "gave the notice at the request of the purchaser, appears to me "as regards the subsequent liability wholly immaterial.

"I think it is the proper course that the vendor should give "notice of the impending vacancy to the purchaser, and ask him "what he wishes to be done; because if the purchaser says I am "willing to run the risk of the farms being unlet, and I will "guarantee you against any loss that will arise to you in case the

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[1] (1877) 6 Ch.D. 469.

[2] Ibid. 476.

" purchase goes off, it might be a proper thing to allow them to " remain unlet."

In the circumstances that prevailed in Nairobi the reletting had the same effect in relation to value as the leaving vacant of agricultural land. Their Lordships are therefore of opinion that the decision of the Court of Appeal was right.

The vendors sought to rely on other provisions in section 55. In their Lordships' opinion these do not assist or affect the conclusion to which they have come as to the construction and application of section 55 (1) (*e*).

The purchasers sought alternatively to support the decision of the Court of Appeal on the terms of the contract, and on a general proposition that a purchaser ought always to be consulted with regard to a new letting. It is unnecessary to consider circumstances other than the present, which are in their Lordships' opinion covered by section 55 (1) (*e*).

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed and the order of the Court of Appeal confirmed. The appellants must pay the costs of the appeal.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Linklaters & Paines.*

C. C.

[HOUSE OF LORDS.]

ADAMASTOS SHIPPING CO. LTD. . . APPELLANTS;

AND

ANGLO-SAXON PETROLEUM CO. LTD . . RESPONDENTS.

H. L. (E.)*
1958
Feb. 3, 4, 5, 6, 10;
Mar. 6.

Shipping—Charterparty—Clause paramount—" This bill of lading " subject to Act—Whether clause meaningless—Hague Rules—" Loss " or damage arising . . . from unseaworthiness "—Meaning of " loss or damage "—Whether applicable to non-cargo carrying voyages—Whether applicable only to physical loss or damage—(United States) Carriage of Goods by Sea Act, 1936 *(Public, No.* 521, 74*th Congress), ss.* 2, 3 (1), 4 (1) (2), 5 *and* 13*—Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., Arts. II, III, rr.* 1, 8; *IV, rr.* 1, 2; *V.*

Contract—Construction—Repugnancy.

Shipping — Charterparty — Consecutive voyage charter — Extent and

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

H. L. (E.)

1958

ADAMASTOS SHIPPING CO. LTD. v. ANGLO-SAXON PETROLEUM CO. LTD.

nature of owners' obligations to provide and maintain seaworthy vessel during "the voyage" — Continuing warranty of seaworthiness, perils of sea excepted—"Proceed with all convenient "despatch" — Vessel rendered unseaworthy by incompetence of staff—Owners vicariously liable for negligence of servants despite owners' exercise of due diligence in selection and appointment of staff—Delays—Whether claim for loss of services of vessel sustainable—Basis for assessment of damages.

A tanker was chartered by an oil company, under a charter expressed to remain in force for as many consecutive voyages as the vessel could tender for loading within a period of 18 months, to carry cargoes of oil all over the world at specified rates of freight per ton per voyage or a return cargo of fresh water at a lump sum. Clause 1 of the charterparty provided that the vessel "being tight, staunch and strong and every way fitted for the "voyage, and to be maintained in such condition during the "voyage, perils of the sea excepted, shall with all convenient "despatch sail and proceed to" a nominated port and there load a cargo of oil. The following clause was incorporated in the charterparty by a typed slip: "Paramount clause. This bill of lading "shall have effect subject to the Carriage of Goods by Sea Act of the "United States . . . 1936, which shall be deemed to be incorporated "herein, and nothing herein contained shall be deemed a surrender "by the carrier of any of its rights or immunities or an increase "of any of its responsibilities or liabilities under said Act. If "any term of this bill of lading be repugnant to said Act to any "extent, such term shall be void to that extent, but no further." The owners, exercising due diligence, selected and appointed an engine-room staff, but that staff proved incompetent, and by reason of their incompetence (amounting to unseaworthiness) the vessel broke down on the first voyage to her loading port, and other similar incidents followed, with the result that the charterers lost the services of the vessel during 106 days. Invoking the United States Act, the owners claimed that their obligations as to seaworthiness were limited to the exercise of due diligence, as therein provided:—

Held that, on the true construction of the charterparty, the United States Act affected the rights and liabilities of the parties under the contract, despite the use of the words "This bill of "lading . . ." on the typed slip, which words, in accordance with the common meaning and intention of the parties, should be read as if they were "This charterparty . . ."; and that the words in section 5 of the Act "The provisions of the Act shall not be applic-"able to charterparties" must be rejected as being meaningless.

Held further (Lord Morton of Henryton and Lord Reid dissenting) that, notwithstanding the limitations to the applicability of the Act, its material provisions affected the rights and liabilities of the parties in connection with (a) non-cargo carrying voyages as well as cargo carrying voyages, and (b) voyages other than those to and from United States ports, as well as such voyages.

The words "loss or damage" in section 4 of the Act, relating to the immunity of the carrier, refer not only to physical loss or damage to goods but also covered the charterers' loss in only being able to complete fewer voyages than they would otherwise have done.

G. H. Renton & Co. Ltd. v. *Palmyra Trading Corporation of Panama. The Caspiana* [1957] A.C. 149; [1957] 2 W.L.R. 45; [1956] 3 All E.R. 957; *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.* [1942] A.C. 154; 57 T.L.R. 485; [1941] 2 All E.R. 165, and *Petrofina S.A. of Brussels* v. *Compagnia Italiana Trasporto Olii Minerali of Genoa* (1937) 53 T.L.R. 650 considered.

Decision of the Court of Appeal [1957] 2 Q.B. 233; [1957] 2 W.L.R. 968; [1957] 2 All E.R. 311 reversed.

APPEAL from the Court of Appeal (Denning, Parker and Sellers L.JJ.).

This was an appeal from an order of the Court of Appeal dated April 16, 1957, dismissing an appeal by the appellants, Adamastos Shipping Co. Ltd., and allowing a cross-appeal by the respondents, Anglo-Saxon Petroleum Co. Ltd., from an order of Devlin J. dated February 14, 1956. The matter came before Devlin J. on an interim award confined to the issue of liability for damages for breach of contract stated in the form of a special case under sections 14 and 21 (1) of the Arbitration Act, 1950, by John Megaw Q.C., who had been appointed, by agreement between the parties, umpire under an arbitration clause in a charterparty, between the appellants as disponent owners and the respondents as time charterers, dated May 25, 1950. By his order Devlin J. upheld the interim award of the umpire in favour of the charterers and answered certain questions of law in favour of the owners and one question of law in favour of the charterers. The Court of Appeal similarly upheld the interim award of the umpire, but dealt with the questions of law arising thereunder differently from Devlin J. and, in particular, held that the Carriage of Goods by Sea Act, 1936, of the United States of America,[1] had no application to the charterparty.

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[1] (United States) Carriage of Goods by Sea Act [*Public—No.* 521—74*th Congress*]: "Be it enacted by "the Senate and House of Represen-"tatives of the United States of "America in Congress assembled, "That every bill of lading or similar "document of title which is evidence "of a contract for the carriage of "goods by sea to or from ports of "the United States, in foreign trade, "shall have effect subject to the pro-"visions of this Act."

S. 1: "When used in this Act—"(*a*) The term 'carrier' includes the "owner or the charterer who enters "into a contract of carriage with a "shipper. (*b*) The term 'contract of "'carriage' applies only to contracts "of carriage covered by a bill of lading "or any similar document of title, in "so far as such document relates to "the carriage of goods by sea, includ-"ing any bill of lading or any similar "document as aforesaid issued under "or pursuant to a charterparty from

The facts, stated by Viscount Simonds, were as follows: By the charterparty the charterers agreed to charter the vessel, the *Saxon Star* (formerly the *Delaware Sun*), from the owners. The

the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same. (*c*) The term ‘goods’ includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried. (*d*) The term ‘ship’ means any vessel used for the carriage of goods by sea. (*e*) The term ‘carriage of goods by sea’ covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.”

Risks. S. 2: “Subject to the provisions of section 6, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.”

Responsibilities and Liabilities. S. 3: “(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—(*a*) Make the ship seaworthy; (*b*) Properly man, equip, and supply the ship; (*c*) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation. . . . (8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. . . .”

Rights and Immunities. S. 4: “(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section. (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship. . . .”

Surrender of Rights and Immunities and Increase of Responsibilities and Liabilities. S. 5: “. . . The provisions of this Act shall not be applicable to charterparties; but if bills of lading are issued in the case of a ship under a charterparty, they shall comply with the terms of this Act. . . .”

S. 13: “This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this Act the term ‘United States’ includes its districts, territories, and possessions. . . . The term ‘foreign trade’ means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this Act shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions. . . .”

document was headed "Tank Vessel Voyage Charterparty," and in its original printed form contemplated performance thereunder of a single voyage. By clause 1 it was provided that the vessel "being tight, staunch and strong, and every way fitted for the "voyage, and to be maintained in such condition during the "voyage, perils of the sea excepted," should, with all convenient dispatch, sail and proceed to one of a number of named ports to load a full and complete cargo of petroleum products as therein provided and that, being so loaded, she should proceed to one of two discharging ranges. There were, however, attached to the document a number of typewritten clauses (clauses 24 to 52) which were expressed as "deemed incorporated in this charter-"party" and made specific provision for loading and discharge otherwise than as permitted by clause 1. By clause 43 it was provided that the charterparty was to remain in force for as many consecutive voyages as the vessel could tender for loading within a period of about 12 months from the date of her readiness to load on the first voyage. By an addendum of May 26, 1950, this period was extended for a further six months, making in all about 18 months. By clause 44 it was provided that the charterers were to have the option of performing any other voyage at their discretion within the limits of the Institute Warranties Clause of April 15, 1941. Thus the contract was of practically world-wide scope and covered a substantial period of time.

Clause 52 was as follows: "It is agreed that the Chamber of "Shipping War Risks Clauses, dated April, 1937, New Jason "Clause, Paramount Clause, and Both to Blame Collision "Clause, as attached, are to be incorporated in this charter-"party."

The paramount clause on a typed slip was, like the other clauses named, physically attached to the charterparty and was in these terms: "Paramount clause. This bill of lading shall "have effect subject to the provisions of the Carriage of Goods "by Sea Act of the United States, approved April 16, 1936, "which shall be deemed to be incorporated herein, and nothing "herein contained shall be deemed a surrender by the carrier "of any of its rights or immunities or an increase of any of its "responsibilities or liabilities under said Act. If any term of "this bill of lading be repugnant to said Act to any extent, such "term shall be void to that extent, but no further."

The facts as to the voyage, found by the umpire, were these: During June and July, 1950, the vessel underwent special survey and repair at Baltimore. Officers and crew to man her were engaged at New York by the owners, and on July 27, 1950, she sailed in ballast for Curaçao, there to load her first cargo under the charterparty. This was the only "non-cargo carrying" voyage with which the House was concerned. While the vessel was on passage to Curaçao her machinery was seriously damaged. She was taken in tow to San Juan, where repairs were carried out. She then resumed her voyage to Curaçao. Having there loaded a cargo of oil for carriage to Buenos Aires, she sailed on August 19, 1950, but on her passage her boilers began to leak. She therefore put in to Recife (Brazil) for repairs, and on completion of the repairs (which remedied the defects then existing in her machinery) resumed her voyage to Buenos Aires, where she duly arrived and discharged her cargo. On October 5 she sailed from Buenos Aires, picked up a cargo of fresh water from the river as ordered by the charterers, and having bunkered at Monte Video, proceeded again to Curaçao. On her passage there, there was continuous trouble with her machinery, and on her arrival repairs were carried out to enable her to go to the United States for much more extensive repairs. On November 30 she left Curaçao, having loaded a further cargo of oil for discharge at Bayonne in New Jersey. Having discharged it she proceeded to Hoboken, also in New Jersey, where repairs were carried out and completed on February 9, 1951. On the next day she left Hoboken and in accordance with the charterers' orders proceeded to Aruba, where she again loaded. Nothing remained to be told of the remainder of the period covered by the charterparty.

The findings of the umpire on the questions of the seaworthiness of the vessel at different times and the diligence exercised by the owners, comprising only one finding that they had not exercised due diligence, were as follows:

"(1) On the vessel's departure from Baltimore on July 27, "1950, although she was seaworthy as regards her machinery, "she was not seaworthy in that the engine-room staff were "incompetent; but due diligence had been exercised by the "owners in the selection and appointment of the engine-room "staff.

"(2) The damage to the machinery which was caused between "Baltimore and San Juan was caused by the incompetence of the "engine-room staff, which resulted in a series of negligent acts "and omissions.

"(3) On the vessel's departure from Curaçao on August 19, "1950, the vessel was not seaworthy in respect of her machinery

" and due diligence had not been exercised to make her sea-" worthy. The vessel, further, was not seaworthy in that the " engine-room staff were incompetent; but due diligence had been " exercised by the owners in that respect; and in that respect, " though not in respect of her machinery, reasonable and proper " steps had been taken to put the vessel in a seaworthy condition.

" (4) The damage to the machinery which was found at Recife " was caused by the unseaworthiness of the vessel at the start " of the voyage from Curaçao, which unseaworthiness was, in its " turn, caused as is set out in (2) above, the defects thus caused " not having been fully repaired at San Juan.

" (5) On the vessel's departure from Buenos Aires on " October 5, 1950, she was seaworthy in respect of her machinery; " but she was not seaworthy in that the engine-room staff were " incompetent; but due diligence had been exercised by the " owners in that respect, and all reasonable and proper steps had " been taken to put the vessel in a seaworthy condition both as " regards machinery and engine-room staff.

" (6) The damage to the machinery which occurred between " Buenos Aires and Curaçao was caused by the incompetence of " the engine-room staff, which resulted in a series of negligent " acts and omissions."

In paragraph 56 the umpire stated the question of law for the decision of the court in the following terms, save in so far as the opening words were subsequently varied by agreement, by inserting the words in italics: " The question of law for the " decision of the court is: Whether upon the facts as found " and upon the true construction of the charterparty the owners " are in breach of the charterparty *and in so far as they are* " *in breach are not protected from loss or damage of the kind* " *claimed resulting therefrom*: (1) In that the *Saxon Star* was " not seaworthy when she sailed from Baltimore on July 27, " 1950; (2) In that the breakdown of the machinery of the " vessel between Baltimore and San Juan was caused by " the negligent acts or omissions of the engine-room staff; " (3) In that the vessel was not maintained in seaworthy " condition during the voyage from Baltimore to Curaçao; " (4) In that the vessel was not seaworthy when she sailed from " Curaçao on August 19, 1950; (5) In that the vessel was not " maintained in seaworthy condition during the voyage from " Curaçao to Recife; (6) In that the breakdown of the machinery " of the vessel between Curaçao and Recife was caused by the " prior negligent acts or omissions of the engine-room staff; (7) In "that the vessel was not seaworthy when she sailed from Buenos "Aires on October 5, 1950; (8) In that the breakdowns of the "machinery of the vessel between Buenos Aires and Curaçao "(save only the breakdowns of the windlass) were caused by the "negligent acts or omissions of the engine-room staff; (9) In "that the vessel was not maintained in seaworthy condition "during the voyage from Buenos Aires to Curaçao; (10) In that "the owners failed to ensure that the vessel performed her service "under the charterparty with all convenient despatch; or (11) On "any other ground?"

Devlin J. declined to deal with these matters but answered the following questions of law subsequently agreed by the parties and assented to by him: "(1) Whether the United States Carriage "of Goods by Sea Act (hereinafter called 'the Act') affects the "rights and liabilities of the parties under the charterparty. "(2) If the answer to (1) is 'Yes,' whether under the charter-"party any material provisions of the Act affect the rights and "liabilities of the parties in connection with (a) non-carrying "voyages, (b) cargo-carrying voyages other than those to or from "ports in the United States of America. (3) Do the words 'loss "'or damage' in section 4 (1) and/or section 4 (2) of the Act "relate only to physical loss or damage to the goods?"

Devlin J. answered the questions as follows: (1) Yes. (2) (a) No. (2) (b) Yes. (3) No.

The Court of Appeal dismissed the appeal of the owners and allowed the cross-appeal of the charterers and answered each of the questions of law stated by the umpire in the affirmative. They held that the United States Act was inapplicable.

Ashton Roskill Q.C., *T. G. Roche Q.C.* and *Basil Eckersley* for the appellant company (the shipowners). The cardinal issue relates to the standard of the shipowners' responsibilities and immunities under the charterparty and the addendum. It is clear from the terms of the document itself that the charterparty contemplates a series of different voyages. It is admitted that the consequence of the application of section 3 (1) of the United States Act, including the words "at the beginning of the "voyage," is that the shipowners were obliged to use due diligence to provide a seaworthy ship, not only at the start of the first voyage, but at the start of each voyage under the charterparty. Unless there is want of due diligence they are not responsible, nor are they responsible for the negligence of their servants in the ship's management. The rights, immunities and obligations contracted for are those imposed by the Hague Rules, whereas the respondent charterers contend that the appellants are under an absolute obligation to provide a seaworthy ship for each voyage under the charterparty and under a continuing obligation to maintain it at all times in a seaworthy condition. That turns on the meaning of the "paramount clause" which is expressly included in the charterparty. The appellants contend and the respondents deny that the Carriage of Goods by Sea Act, 1936, of the United States is incorporated in the charterparty.

The charterparty in its original printed form contemplates a single voyage, but the typed additions cover a wide variety of separate voyages within the limits of the Institute Warranties Clause. There were provisions for loading and discharge otherwise than as permitted by clause 1. The additional typed clauses (clauses 24 to 52) are specifically expressed to be incorporated in the charterparty. Clause 52 identifies the attached clauses and provides that they "are to be incorporated in this charterparty." The attached clauses and in particular the "paramount clause" are physically attached to the charterparty.

The United States Act applies the Hague Rules, which were the product of the Brussels Convention of 1923, the scheme of which was that the various contracting States should apply the Rules by municipal legislation. Those States which have done so are enumerated in Scrutton on Charterparties, 16th ed., pp. 564–566. The Rules define the responsibilities of shipowners under bills of lading. It is a common practice to incorporate the Hague Rules into charterparties, so as to give them contractual as well as statutory force. One method of doing this has been to incorporate in the charterparty the United States "paramount "clause." Not all "paramount clauses" are in precisely the same form. The House is not here concerned with statutory national limitations but with the provisions of this contract.

The parties intended (1) that the contract should have effect subject to the provisions of the Act which was to be deemed to be incorporated in the contract; (2) that nothing in the contract was to be deemed a surrender by the shipowners of any of their rights and immunities or an increase of their responsibilities or liabilities under the Act; (3) that in the event of any repugnancy between the terms of the contract and of the Act, the terms of the Act should prevail. What Devlin J. said [2] as to the attitude of the court to the intentions of the parties is right.

[2] [1957] 2 Q.B. 233, 249; [1957] 2 W.L.R. 508; [1957] 1 All E.R. 673.

The following considerations are submitted: (1) It is a common business practice to introduce the Hague Rules contractually into a charterparty. (2) It is a common business practice to incorporate the United States "paramount clause" in a charterparty. (3) This practice was recognised in Scrutton on Charterparties, 16th ed., p. 464, and in the two previous editions and also in the present case by Devlin J.[3] and by Denning L.J. in the Court of Appeal.[4] (4) The "paramount clause" itself emphasises "rights," "immunities," "responsibilities" and "liabilities," the very words used in the introductions to sections 3 and 4 of the United States Act. This is a signpost to the intention of the parties. (5) The Oxford English Dictionary defines "paramount" as "superior to all others, in influence, power, position or importance; pre-eminent." The parties in their contract call this a "paramount clause." See also section 3 (8) and section 13 of the United States Act. (6) As to the steps which the parties took to incorporate this typed clause into the charterparty, note its physical attachment and see clause 52. See also *Stafford Allen & Sons Ltd.* v. *Pacific Steam Navigation Co.*[5] (7) There is plenty of warning in the authorities against being astute to find fault with the way in which business men prepare their documents. There may be conflict between the mental approach of the lawyer and that of the business man: see *Hillas & Co. Ltd.* v. *Arcos Ltd.*,[6] which indicates the well-recognised way of construing business documents. (8) The incorporation in one document of something out of another is a common way of composing business documents: see *per* Devlin J.[7] (9) Business documents often start life in a common form applicable to a wide variety of transactions, the general and absolute provisions of those documents being thereafter cut down by special stipulations which the parties make for the purpose of their particular adventure. This was a form for a single voyage and it imposed absolute obligations in clause 1 which were cut down by the incorporation of the paramount clause. The intention of the parties was ascertainable. Devlin J. was right and the Court of Appeal were wrong.

When Parker L.J. said[8] that in all cases which have come before the courts the parties have identified the provisions of the Hague Rules which they intended to apply, he overlooked the terms of the charterparty in *Imperial Smelting Corporation Ltd.* v. *Joseph Constantine Steamship Line Ltd.*[9]

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[3] [1957] 2 Q.B. 233, 247–249.

[4] [1957] 2 Q.B. 233, 267; [1957] 2 W.L.R. 968; [1957] 2 All E.R. 311.

[5] [1956] 1 W.L.R. 629, 634; [1956] 2 All E.R. 716.

[6] (1932) 147 L.T. 503, 514.

[7] [1957] 2 Q.B. 233, 249–250.

[8] [1957] 2 Q.B. 233, 271.

The fact that the "paramount clause" refers to "this bill "of lading" presents no difficulty. The parties used slapdash language but it was perhaps no worse than other business language which has come before the courts. The effect of the clause is that this document is to be subject to the Act; the provisions of the Act are to be incorporated in this document; the document is this charterparty. The words "this bill of lading" should be read as "this charterparty." Note the words "incorporated "herein" in the paramount clause: see *Cowen* v. *Truefitt Ltd.*[10] in connection with the doctrine of falsa demonstratio non nocet, which should be applied here because the intentions of the parties are sufficiently ascertainable.

As to the incorporation of terms in a charterparty, see *Hamilton & Co.* v. *Mackie & Sons*,[11] which was approved in *T. W. Thomas & Co. Ltd.* v. *Portsea Steamship Co. Ltd.*[12] Here, admittedly, something must be left out. It should be what Devlin J. left out: see *Golodetz* v. *Kersten, Hunik & Co.*[13] and *Tudor Accumulator Co. Ltd.* v. *Oceanic Steam Navigation Co. Ltd.*[14] These two cases are not inconsistent because the clauses are different. The latter case does not conflict with the former, which materially assists the appellants. *Serraino & Sons* v. *Campbell*[15] is useful, not for its facts, but for its approach.

One necessarily reaches the conclusion that here the rights and obligations are governed by the provisions of the Act. The obligations arose at the start of each successive voyage under the charterparty. What must be struck out is the provision that it does not apply to charterparties (section 5) and also the provision that it applies to contracts of carriage to or from United States ports (section 13). See also the preamble to the Act.

It is inconceivable that two commercial concerns should contract that the shipowners should be liable in damages to the extent of perhaps £100,000 (approximately the amount here claimed) in respect of the unseaworthiness of their ship, no matter how much care they took. The paramount clause is paramount; it is not an exception upon an exception.

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[9] [1940] 1 K.B. 812, 816; 56 T.L.R. 461; [1940] 2 All E.R. 46; (C.A.) [1940] 2 K.B. 430; 56 T.L.R. 882; [1940] 3 All E.R. 211; (H.L.) [1942] A.C. 154; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[10] [1899] 2 Ch. 309, 314.

[11] (1889) 5 T.L.R. 677.

[12] [1912] A.C. 1, 2, 6, 6–7, 9, 10.

[13] (1936) 24 Ll.L.Rep. 374.

[14] (1924) 41 T.L.R. 81; 20 Ll.L. Rep. 106.

[15] [1891] 1 Q.B. 283, 289, 301; 7 T.L.R. 174.

Nelson Line (Liverpool) Ltd. v. *James Nelson & Sons Ltd.*[16] is very different from the present case. [*Petrofina S.A. of Brussels* v. *Compagnia Italiana Trasporto Olii Minerali of Genoa*[17] was referred to.]

Devlin J. correctly stated the provisions of the United States Act which must be disregarded.[18]

It follows that by reason of the terms of the clause paramount the absolute obligation of maintenance in clause 1 of the charterparty must go. It involved a continuing and absolute obligation to maintain the ship seaworthy at all times and involved depriving the shipowners of their rights and immunities under the Hague Rules and an assumption of liabilities beyond those Rules.

As to the decision of Devlin J. that the United States Act did not affect the rights and liabilities of the parties in connection with non-cargo carrying voyages, he was wrong in putting too limited a construction on the Hague Rules and made an erroneous approach to the problem. Devlin J. appears to have been impressed by the fact that voyage charterparties often contain cesser clauses. This is true but, it is submitted, is irrelevant and affords no useful guide.

In the circumstances of this case the meaning of "loss or "damage" in section 4 of the United States Act only arises indirectly. Devlin J. considered that the words had a wider meaning than physical loss or damage, and the Court of Appeal did not decide otherwise. Accordingly, the onus in this House is on the respondents.

Sections 3 and 4 are perfectly clear and stand on their own legs.

The shipowners' obligation was to use due diligence at the start of each voyage to make the ship seaworthy and man her properly. That they did, and so they are protected. Further, there is no justification for limiting the ambit of the Hague Rules, and the shipowners are protected against liability for the loss or damage which occurred here. They are under no obligation to maintain the ship seaworthy at all times.

Alternatively, the express obligation of clause 1 stands together with the incorporation of the Hague Rules so as to limit it in the ordinary meaning of the words to the physical condition of the ship. The obligation as to manning could be displaced by showing due diligence under the Hague Rules.

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[16] [1907] 1 K.B. 769; 23 T.L.R. 302; (H.L.) [1908] A.C. 16, 17, 18–19; 24 T.L.R. 114.

[17] (1937) 58 T.L.R. 650, 653.

[18] [1957] 2 Q.B. 233, 250, 251.

The shipowners' main proposition is that, despite the wording of the paramount clause, no part of the United States Act should be incorporated in the charterparty except sections 3 and 4, which are applicable to charterparties. These provisions should be read in their new contractual context without any regard to their limited extent in their original statutory context. Thus they apply to voyages besides those to or from the United States and also to voyages where no cargo is carried.

A. A. Mocatta Q.C. and *S. O. Olson* for the respondent company (the charterers). The right approach to this case is that expressed by Denning L.J. in the Court of Appeal.[19]

To the extent that the United States Act does apply, it is no protection to the shipowners, in view of the umpire's findings of fact. The court will not, under the guise of construction, make a contract for the parties, and here the contract made means nothing at all. It is for the shipowners to bring themselves within the exception, and, if they do not, they are liable at common law. The principle that the court will not make a contract for the parties is exemplified in cases where the question is whether the words used make a contract at all or whether, the parties being ad idem, the words used make any sense: see *Hillas & Co. Ltd.* v. *Arcos Ltd.*[20] and *G. Scammell & Nephew Ltd.* v. *Ouston.*[21] Denning L.J. had that sort of thing in mind in what he said in the present case.[22] These cases illustrate the principle to be applied when the question is: Was there a contract at all? As to the principle to be applied in the case of an exceptions clause, see *Nicolene Ltd.* v. *Simmonds.*[23] If there are two or three or more possible meanings of a clause but one of them can on construction be said to be the right one, the clause is not meaningless or ambiguous. But if between two meanings the arguments are evenly balanced, the clause is void for uncertainty. The court will not struggle hard to give a meaning to a doubtfully expressed exceptions clause. *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*[24] illustrates this principle. It also shows that clear words are required to excuse shipowners from liability for a breach of warranty of seaworthiness or for negligence. In that case there was undoubtedly a contract, but the words on which the shipowners sought to rely

[19] [1957] 2 Q.B. 233, 265.

[20] 147 L.T. 503, 514.

[21] [1941] A.C. 251, 260, 268, 272–273; 57 T.L.R. 280; [1941] 1 All E.R. 14.

[22] [1957] 2 Q.B. 233, 269.

[23] [1953] 1 Q.B. 543, 549; [1953] 2 W.L.R. 717; [1953] 1 All E.R. 822.

[24] [1908] A.C. 16.

were meaningless: see also *Elderslie Steamship Co. Ltd.* v. *Borthwick*,[25] *per* the Earl of Halsbury L.C. and Lord Macnaghten.

Here the words of clause 1 of the charterparty are clear and the paramount clause does not provide the shipowners with a clear protection against their liability. The United States Act can only apply to the charterparty as a matter of contract if the terms of the charterparty lead to that conclusion. Otherwise the Act applies only to bills of lading and to voyages to or from the United States. Having regard to the purpose and design of the Act, it is hard to make it apply to charterparties. Thus the problem of maintenance is not provided for by the Act because it does not envisage a set of circumstances in which it arises.

The shipowners claim that the paramount clause is incorporated in the charterparty, but in order to do so they must invoke the doctrine falsa demonstratio non nocet to alter the language of the document. This is not permissible here. The paramount clause does not have the effect of making the charterparty subject to the United States Act. It does not say so, for it refers to a bill of lading, and the appellants, in order to succeed, must change the express language of the document. It would have been easy to make the charterparty subject to whatever it was that the parties wished it to be subject to. There is no reported case where the Hague Rules have been applied to a consecutive voyage charterparty or to a time charter, to which there are insuperable difficulties. As to the incorporation of the Hague Rules legislation in a charterparty, see *Leeds Shipping Co. Ltd.* v. *Duncan Fox & Co. Ltd*,[26] *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[27] and *Minister of Food* v. *Reardon Smith Line Ltd.*[28] With these examples before it, the court should not go out of its way to amend the documents in the present case. There is nothing to show that it is a common and recognised practice to incorporate the Hague Rules in long-term consecutive voyage charterparties. In the forms of charter issued by the Chamber of Shipping there is only one at all comparable to this one. There is no common and recognised practice in incorporating the Hague Rules legislation. For the most part, specific clauses of it are picked out. The difference between a single voyage charter and a consecutive voyage charter is vital, since, if one seeks to apply the United States Act to the latter, one must decide whether the exercise

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[25] [1905] A.C. 93, 95, 96.

[26] (1932) 37 Com.Cas. 213.

[27] [1940] 1 K.B. 812, 816; (H.L.) [1942] A.C. 154.

[28] [1951] 2 T.L.R. 1158.

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of due diligence must be an exercise once and for all or must be an exercise as many times as there are voyages. The Act makes no provision for the maintenance of the ship over a long period or for due dispatch in the performance of the contract. One may ask: if, after the completion of the second or the fourth cargo-carrying voyage, there is a survey, what is the position under a consecutive voyage charter? The origin of the paramount clause is in section 13 of the United States Act, which is similar to section 3 of the English Act, the Carriage of Goods by Sea Act, 1924. It may be that the intention of the parties in the present case was that any bills of lading under the charter were to incorporate the United States Act. One cannot be satisfied that their intention was that the clause should apply to the charterparty. If one assumes it, one gets into grave difficulties, since what is actually said is "this bill of lading." If those words are read as meaning "this charterparty," that involves incorporating into it the whole of the United States Act, since the paramount clause goes on to say that "nothing herein contained shall be deemed a surrender by the carrier of any of its "rights or immunities or an increase of any of its responsibilities "or liabilities under said Act." It does not refer to an amended or expurgated Act, but to the whole Act. But nothing in the Act affects the rights of anyone under a charterparty. One would have to alter the references to "the said Act." For the principles applicable, see *Hamilton & Co.* v. *Mackie & Sons* [29] and *Serraino & Sons* v. *Campbell.*[30] *T. W. Thomas & Co. Ltd.* v. *Portsea Steamship Co. Ltd.*[31] does not differ from these principles. *Golodetz* v. *Kersten, Hunik & Co.*[32] does not help, because it was a bill of lading case and the present difficulties did not arise there.

Even if the United States Act applies, its exempting provisions do not apply to non-cargo carrying voyages, and the whole of the loss or damage here claimed flowed from the initial unseaworthiness on such a voyage. Nor do they apply to voyages other than those to or from United States ports. The terms of the paramount clause state: "If any term of this bill of lading be "repugnant to said Act to any extent, such term shall be void "to that extent." On this point see what was said by Devlin J. at the trial.[33] See also Scrutton on Charterparties, 16th ed., pp. 468, 492–493.

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[29] 5 T.L.R. 677.
[30] [1891] 1 Q.B. 283, 289–290.
[31] [1912] A.C. 1, 5.
[32] 24 Ll.L.Rep. 374.
[33] [1957] 2 Q.B. 233, 251–252.

The words of section 4 of the United States Act should be limited to physical loss or damage: see *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[34]

If the Act applies to this charterparty, then, contrary to the view of Devlin J.,[35] there is no justification for striking out any part of the Act. This is dealt with in the Court of Appeal.[36] The shipowners have not specified what words they want cut out. It is to be noted that many of the same functions are carried out under a charterparty as under a bill of lading.

There is here a finding in favour of the charterers that the shipowners' servants were negligent. If the shipowners are right in saying that section 4 (2) covers them, they are completely exempt, but if it does not apply, they have no protection at all. If it had not been for the events complained of, the charterers would have got in three more voyages. They must succeed to the extent that they can establish that they have suffered the damage alleged through negligence for which the shipowners are not excused by the Act.

As to the claim for damages, the pleadings in *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[37] may be found in the printed record of the appeal to the House of Lords and indicate that the claim was almost identical with the one in the present case. See also *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama*[38] and *Goulandris Brothers Ltd.* v. *B. Goldman & Sons Ltd.*[39]

If the facts establish that the admitted incompetence of the engine room staff was the cause of all that happened subsequently, the shipowners are not protected by the Act in respect of the time lost unless they can establish that the Act applied to the ballast voyage, even though it may have some application to the charterparty. The findings of fact are sufficient for the charterers: see *The Christel Vinnen.*[40] If the dominant cause of the damage was as alleged, the subsequent exercise of due care does not protect the shipowners.

Ashton Roskill Q.C. in reply. If the shipowners are right, they are under no obligations as to maintenance.

The shipowners do not resile from their opening submissions or add to the arguments in support of the submission that the words "bill of lading" in the paramount clause must be read as "charterparty." The charterers' argument that the intention was that the clause should apply to bills of lading issued under the charterparty is a lawyers' point divorced from what could have been the intention of the charterers. It is unreal from a commercial point of view in a commercial contract. The intention of the parties must have been (1) to incorporate in the contract the standard of rights and liabilities set out in the Act; (2) to provide that those rights and liabilities should be paramount; (3) that nothing in the contract was to be deemed a surrender of those rights or an increase of those liabilities, and (4) that any term in the contract repugnant to that standard should be void.

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[34] [1940] 1 K.B. 812, 839; (H.L.) [1942] A.C. 154, 175.

[35] [1957] 2 Q.B. 233, 250, 251.

[36] Ibid. 268, 271–272.

[37] [1940] 1 K.B. 812, 839–840; (H.L.) [1942] A.C. 154, 175.

[38] [1957] A.C. 149, 166, 169, 173; [1957] 2 W.L.R. 45; [1956] 3 All E.R. 957.

[39] [1958] 1 Q.B. 74; [1957] 3 W.L.R. 596; [1957] 3 All E.R. 100.

[40] [1924] P. 208; 40 T.L.R. 845.

The charterers sought to suggest that there were insuperable difficulties in applying that intention to a consecutive voyage charterparty, but there is nothing esoteric about a consecutive voyage charterparty. As a business transaction one contract for 10 voyages is no different from 10 contracts, each for one voyage, but it is simpler to negotiate. Before the war it was not as frequent as since, but for many years consecutive voyage charterparties have been greatly favoured. One would expect the absolute liability to be qualified to one of due diligence because of the length of time of the contractual nexus. An absolute liability would be an intolerable burden throughout the period of a contract covering 10 or more voyages.

As to the provision in clause 1 for "all convenient dispatch," if the shipowners are prevented from performing the contract notwithstanding "due diligence" on their part, they are not liable (section 4 of the United States Act). The incorporation of some terms of the Act into charterparties is a recognised practice, as Devlin J. indicated.[41] The contention for which the charterers contend produces an astounding result and should be rejected in construing a commercial contract. It is commercially unreasonable to suppose that the parties ever intended the paramount clause to apply only in the limited circumstances suggested by the charterers; and they suggest no commercial reason for it.

It is unreal and uncommercial to suggest that the obligations were meant to be confined to voyages to and from United States ports. It would be an absurd provision to incorporate in the charterparty: *per* Denning L.J. in the Court of Appeal.[42]

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[41] [1957] 2 Q.B. 233, 248.

[42] Ibid. 268.

The whole of sections 3 and 4 of the United States Act must be incorporated in the charterparty, because what the parties intended to incorporate in the contract was the standard of obligations provided by the Act. Commercial men are often slapdash and the courts construe their contracts with an eye to the intention of the parties. The intention is deduced from the words used and from the surrounding circumstances. This contract can be read as wide enough to cover any voyages, because section 13 of the United States Act does not say in terms that it is confined to voyages to and from the United States.

As to the charterers' point on non-cargo carrying voyages, the only one being the preliminary voyage, their contention produces capricious and unreal results. It would be odd if greater care were required when the shipowners were not bailees than when they were, and if they were under increased obligations when they were earning no freight at all. The precise ambit of the statutory operation of the Hague Rules is still open to debate. See *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[43] as to their application. As to the position where there is a charter " to " proceed to a port and there load," see Scrutton on Charterparties, 13th ed., pp. 123–124; 16th ed., pp. 124–125, *Bruce* v. *Nicolopulo*[44] and *Barker* v. *M'Andrew*.[45]

As to *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*,[46] cited by the charterers, this case is made clearer by another report[47] which gives the actual words of the charterparty.

As to the charterers' point that " loss or damage " in section 4 of the Act is confined to physical loss or damage, the short answer is that the words of the section do not say so Little help on this problem is derived from *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama*[48] or *Goulandris Brothers Ltd.* v. *B. Goldman & Sons Ltd.*,[49] which are neither for nor against either of the parties here and can therefore be disregarded.

The observations of Atkinson J. and Lord Maugham in *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[50] were obiter dicta and were wrong. No reasons for

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[43] [1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158.

[44] (1855) 11 Exch. 129.

[45] (1865) 18 C.B.N.S. 759.

[46] [1940] 1 K.B. 812; (H.L.) [1942] A.C. 154.

[47] 66 Ll.L.Rep. 147.

[48] [1957] A.C. 149.

[49] [1958] 1 Q.B. 74.

[50] [1940] 1 Q.B. 812, 839; (H.L.) [1942] A.C. 154, 175.

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them were given. See Scrutton on Charterparties, 16th ed., p. 484, and what Devlin J. said in this case.[51]

This case is distinguishable from *The Christel Vinnen.*[52]

As to striking out words which produce a commercially capricious result, see *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama*[53] and *Glynn* v. *Margetson & Co.*,[54] *per* Lord Halsbury.

Petrofina S.A. of Brussels v. *Compagnia Italiana Trasporto Olii Minerali of Genoa*[55] and *Nelson Line* (*Liverpool*) *Ltd.* v. *James Nelson & Sons Ltd.*[56] are different from the present case because here the owners accept the obligation of establishing that they exercised due care.

A. A. Mocatta Q.C. In *Glynn* v. *Margetson & Co.*[57] the ratio decidendi was that the main object of the bill of lading was to carry oranges from Spain to England, and on construction it was held that this must not be interfered with by the liberty clause. But the main object of the contract here was to carry oil from one part of the world to another. There was a difference of approach between Lord Herschell[58] and Lord Halsbury.

Their Lordships took time for consideration.

March 6. VISCOUNT SIMONDS. My Lords, the question in this appeal is whether and to what extent the appellants are, upon the facts found in an interim award stated in the form of a special case, in breach of a charterparty made on May 25, 1950, between the appellants as disponent owners and the respondents as charterers. I will refer to them in this opinion as "owners" and "charterers." The Court of Appeal has held them to be in breach in respect of all the matters raised in the special case, overruling the decision of Devlin J., who in effect held them to be in breach in respect of one matter only. The question would, I think, be stated more accurately by asking whether upon the true construction of the charterparty the owners are by reason of its provisions exempt from any liability in respect of their acts or omissions for which they might otherwise be liable.

[His Lordship read the relevant parts of the charterparty, including clause 52 and the paramount clause, and continued:]

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[51] [1957] 2 Q.B. 233, 255.

[52] [1924] P. 208.

[53] [1957] A.C. 149.

[54] [1893] A.C. 351, 357 et seq.; 9 T.L.R. 437.

[55] 53 T.L.R. 650.

[56] [1908] A.C. 16.

[57] [1893] A.C. 351.

[58] Ibid. 354.

This clause provides that the provisions of the Carriage of Goods by Sea Act of the United States "shall be deemed to be "incorporated herein." "Herein" can only mean "in this "contract." The contract must therefore be read as if the provisions of the Act were written out therein and thereby gained such contractual force as a proper construction of the document admits. Much of the Act is quite irrelevant, a fact which need not surprise us since it was passed to comply with the Brussels Convention. It dealt first and last with bills of lading, and by section 5 expressly enacted that its provisions should not be applicable to charterparties, but that if bills of lading were issued in the case of a ship under a charterparty they should comply with the terms of the Act.

I am reluctant to burden your Lordships with many of its provisions, but it has been strenuously urged that the persistent reference to bills of lading, carriage of goods and so on limits the possibility of adapting the clauses to the contractual relation of owner and charterer under a charterparty. I will therefore set out some of the provisions, hoping that I omit nothing which is deemed of importance.

The Act enacts: "That every bill of lading, or similar document of title which is evidence of a contract for the carriage of "goods by sea to or from ports of the United States in foreign "trade, shall have effect subject to the provisions of this Act." Section 1 is a definition section, defining "carrier," "contract of "carriage," "goods," "ship," and "carriage of goods."

Section 2 provides that (subject as therein mentioned) under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities thereinafter set forth.

Sections 3 and 4 (so far as material) are as follows:

"*Responsibilities and Liabilities.* Section 3. (1) The carrier "shall be bound, before and at the beginning of the voyage, to "exercise due diligence to—(*a*) Make the ship seaworthy; (*b*) "Properly man, equip, and supply the ship; (*c*) Make the holds, "refrigerating and cooling chambers, and all other parts of the "ship in which goods are carried, fit and safe for their reception, "carriage, and preservation.

"*Rights and Immunities.* Section 4. (1) Neither the carrier "nor the ship shall be liable for loss or damage arising or "resulting from unseaworthiness unless caused by want of due

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" diligence on the part of the carrier to make the ship seaworthy, " and to secure that the ship is properly manned, equipped, and " supplied, and to make the holds, refrigerating and cool " chambers, and all other parts of the ship in which goods are " carried fit and safe for their reception, carriage, and preserva- " tion in accordance with the provisions of paragraph (1) of " section 3. Whenever loss or damage has resulted from unsea- " worthiness, the burden of proving the exercise of due diligence " shall be on the carrier or other persons claiming exemption " under this section. (2) Neither the carrier nor the ship shall " be responsible for loss or damage arising or resulting from— " (*a*) Act, neglect, or default of the master, mariner, pilot, or the " servants of the carrier in the navigation or in the management " of the ship; . . ."

I can now conveniently state the questions of law which it fell to the learned judge to answer, not in the first place, indeed, as stated in the special case but as subsequently agreed by the parties and assented to by him. They were: (1) Whether the United States Act (to which I have referred) affects the rights and liabilities of the parties under the charterparty? (2) If the answer to (1) is Yes, whether under the charterparty any material provisions of the Act affect the rights and liabilities of the parties in connection with (a) non-cargo carrying voyages; (b) cargo carrying voyages other than those to or from ports in the U.S.A.? (3) Do the words " loss or damage " in section 4 (1) and/or section 4 (2) relate only to physical loss of or damage to the goods?

Upon the answers given to these questions depended the answers to the 10 questions set out in the special case. It will be clear to your Lordships, when I have briefly summarised the facts as found by the umpire, that the single issue is whether and how far the owners can escape liability to the charterers by reason of findings in their favour that they exercised due diligence in respect of those acts or omissions which might otherwise have rendered them liable.

The relevant facts are briefly these. [His Lordship stated the facts and the umpire's findings and continued:] My Lords, I return to the questions of law which I have already set out.

Upon the first question a broadside attack was made upon the owners' claim to rely on the paramount clause. In the context of this charterparty, it was said, the clause is insensible and must be rejected. It opens with the words " This bill of lading," and it purports to incorporate the provisions of an Act of the United States which itself enacts that it shall not apply to charterparties.

It is therefore ex facie inapplicable to this charterparty. My Lords, I must confess that this is to me an attractive approach and I would willingly adopt it. For it is not agreeable to find a business transaction of some importance carried through in a manner which Devlin J., as I think, too indulgently described as "slapdash." But I do not think that I can do so. I can entertain no doubt that the parties, when they agreed by clause 52 of the charter that the "paramount clause . . . as attached" should be incorporated in their agreement, and proceeded physically to attach the clause which I have set out, had a common meaning and intention which compels me to regard the opening words "This bill of lading," as a conspicuous example of the maxim "falsa demonstratio non nocet cum de corpore constat." There can be no doubt what is the corpus. It is the charterparty to which the clause is attached. Nor, pursuing this main line of attack, can I be driven to a wholesale rejection of the clause because the Act, whose provisions are in turn deemed to be incorporated, itself enacts that its provisions shall not apply to charterparties. I cannot attribute to either party an intention to incorporate a provision which would nullify the total incorporation.

My Lords, I should have come to this conclusion without the aid of any external circumstance. But I am confirmed in it by the notorious fact, to which both the learned judge and the editors of the 16th edition of Scrutton on Charterparties refer, that the parties to a charterparty often wish to incorporate the Hague Rules in their agreement: and by that I do not mean, nor do they mean, that they wish to incorporate the ipsissima verba of those rules. They wish to import into the contractual relation between owners and charterers the same standard of obligation, liability, right and immunity as under the rules subsists between carrier and shipper: in other words, they agree to impose upon the owners, in regard, for instance, to the seaworthiness of the chartered vessel, an obligation to use due diligence in place of the absolute obligation which would otherwise lie upon them.

Here, then, my Lords, is the agreement that the parties have made, an original printed document with sundry erasures and typed additions, a complex of attached clauses and an Act of the United States of America whose provisions are deemed to be incorporated. How shall it be construed? The same sort of problem has arisen before, and I agree with Devlin J. that the procedure should be followed here which was laid down in

Hamilton & Co. v. *Mackie & Sons*,[1] and approved in this House in *T. W. Thomas & Co. Ltd.* v. *Portsea Steamship Co. Ltd.*[2] The learned judge cited the material passage from the judgment of Lord Esher and I need not repeat it. It is obvious that there is much in the Act which in relation to this charterparty is insensible, or, as I would rather say, inapplicable, and must be disregarded. But in regard to the matters with which the questions now to be answered are concerned there has been acute controversy.

First, the Act, being an Act of the United States, is geographically confined to its own jurisdictional limits. " . . . "every bill of lading or similar document of title which is "evidence of a contract for the carriage of goods by sea to "or from ports of the United States, in foreign trade, shall "contain a statement that it shall have effect subject to the "provisions of this Act." Therefore, it is said, let it be granted that the incorporation of the Act is not altogether insensible, and that the statutory standard of obligation is contractually imported into the charterparty. Yet why should it extend beyond the limits prescribed by the Act itself? Why should it apply to any other voyages than those to or from ports of the United States? I do not think that there is a clearer answer to this question than that given by the learned judge. The contract between the parties is of worldwide scope: the area of State jurisdiction is necessarily limited, and, because it is limited, the Act is given a restricted operation. No reason has been suggested, nor, as far as I am aware, could be suggested, why a similar restriction should be imported into the contract. On the contrary, to do so would from the commercial point of view make nonsense of it. I find it easy, therefore, as did the learned judge, to construe this contract as making the substituted standard of obligation coterminous with the enterprise.

The second and perhaps more difficult question relates to the non-cargo carrying voyages. The learned judge, though he felt the weight of the argument to the contrary, decided that to such voyages the express warranty of seaworthiness in clause 1 of the charterparty must apply. It is with great diffidence that I come to the opposite conclusion.

I do not want to anticipate what will presently be said about the nature of the loss or damage in respect of which obligations and annuities are created by the Act. I will merely assume that

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[1] (1889) 5 T.L.R. 677.

[2] [1912] A.C. 1.

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it is not confined to loss or damage to goods but extends also to the loss suffered by the charterers owing to the delay caused by unseaworthiness, the loss in fact alleged to have been suffered by the charterers in the present case. It is in this context that the question must be considered to what voyages the new immunity extends.

My Lords, it is, I think, permissible in a consideration of this commercial transaction to ask what possible difference it makes to the charterers whether the delay, to which their loss is due, occurs when the ship is in ballast or is loaded with a cargo of oil or of water. It matters not for this purpose whether the charterparty was for a single voyage, as the original document seemed to contemplate, or for a number of consecutive voyages. The contractual subject-matter was the whole period during which the vessel was under charter, and it is, in my opinion, to this whole period that the parties agreed that the statutory standard of obligation and immunity should relate. I think that the learned judge might have come to the same conclusion but for the fact that he thought that it might lead to an unreasonable and unnecessary burden being placed upon the owner. For it appeared to him that it would or might impose upon him an obligation under section 3 (1) (*c*) of the incorporated Act to exercise due diligence to " Make the holds, refrigerating and cooling chambers, " and all other parts of the ship in which goods are carried, fit " and safe for their reception, carriage, and preservation " even at a time when the vessel was leaving in ballast for her port of loading. I do not feel myself qualified, in the absence of any evidence, to say how serious a burden this would be. But I would, with great respect, doubt whether the obligation under section 3 (1) (*c*) arises until the vessel arrives at the port of loading, though it may be convenient substantially to perform it at an earlier stage. I do not, in any case, find in this consideration a sufficient counterweight to the fact that from a commercial point of view it is unlikely that owner and charterer will adopt a shifting standard of obligation between cargo carrying and non-cargo carrying voyages. It does not appear to me that the fact that voyage charterparties often contain a cesser clause offers a useful analogy.

Upon this part of the case it was further argued that non-cargo carrying voyages could not be brought within the scope of the diminished obligation because the Act is an Act dealing with the carriage of goods by sea under bills of lading, and in almost every section deals with obligations, liabilities, rights and immunities in respect of goods so carried. Therefore, it was said, the incorporated provisions could have no application to a voyage in which no goods were carried. But this seems to me merely to restate the problem in other words. The question remains what is the meaning and effect of a commercial agreement which contemplates voyages with or without cargo and introduces by reference to the United States Act a qualified standard of obligation. I have already stated my opinion and would only add that I find it difficult upon a broad consideration of the case to make any distinction between non-cargo carrying voyages and voyages to or from other than United States ports. A narrow interpretation would exclude, a generous one include, both of them in the substituted standard of obligation.

I conclude, therefore, this part of the case by saying that here also the owners are entitled to succeed in their appeal.

I come now to the question of loss or damage. Owing to the delay caused by the unseaworthiness of the vessel she was able to complete fewer voyages than she otherwise would have done within the period of the charter. The charterers, therefore, claimed damages in a very large sum, the claim being for the difference between the charter and market rates of freight on cargo carrying voyages which might have been performed within the 18 months if she had been continuously fit for service. I have stated the claim in the words of the learned judge. The question is whether the words " loss or damage " in section 4 (1) or section 4 (2) of the Act relate only to physical loss of, or damage to, goods.

This is a short point upon which I can only adopt the reasoning and conclusion of the learned judge. It is perhaps sufficient to say that there is nothing in section 4 (1) or section 4 (2) which expressly limits loss or damage to physical loss or damage to the goods, and that section 2 does not constrain me to put a narrower meaning on the words. There is no authority to the contrary which is binding on your Lordships, and, though I naturally give great weight to anything that falls from Lord Maugham, his observation in *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[3] was obiter and doubtfully relevant to the point now under consideration.

My Lords, this has not been an easy case to decide. Of that the difference of opinion in the courts below of learned judges well versed in this branch of the law is proof enough. Lord Bramwell, in a phrase which the learned editors of Scrutton on

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[3] [1942] A.C. 154, 175; 57 T.L.R. 485; [1941] 2 All E.R. 165.

Charterparties, 16th ed., at p. 186, have done well to preserve, described a certain class of case as "cases where no principle of "law is involved, but only the meaning of careless and slovenly "documents." This is such a case. No doubt there are rules or canons of construction applicable to careless and slovenly, as to other, documents. I have tried to apply them, resolute, on the one hand, to construe commercial agreements broadly and not to be astute to find defects in them or reject them as meaningless and, on the other, not to make a contract for the parties which they have not thought fit to make for themselves. Nor have I forgotten that it is only by sufficiently clear words that an exception to an obligation (whether arising at common law or under the contract itself) can be established: see *Glynn* v. *Margetson & Co.*,[4] *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*,[5] *Hillas & Co. Ltd.* v. *Arcos Ltd.*,[6] *Petrofina S.A. of Brussels* v. *Compagnia Italiana Trasporto Olii Minerali of Genoa*,[7] and *Golodetz* v. *Kersten, Hunik & Co.*,[8] the last-named case being a particularly interesting example of the way in which the court will strive to give a sensible effect to a commercial document. These, no doubt, are the familiar principles applied by the Court of Appeal from whose conclusions I reluctantly differ. I think that the point of difference lies in this, that, looking at the documents as a whole and bearing in mind what the learned judge described [9] as "a general practice, well known to those sitting and practising "in this court," I have no difficulty in seeing the broad purpose and intent of the parties. I must reject, if I can, the unattractive argument urged by the charterers through their counsel that the agreement to which they put their hands meant nothing at all. It is true that at a certain stage it was suggested that the paramount clause was intended to refer to bills of lading issued under the charterparty, but this suggestion has been rightly rejected for the conclusive reasons given by Parker L.J. If it did not mean that but did mean something, what did it mean? I think the parties intended, as I have already said, to introduce as a term governing their relationship as owners and charterers the limited measure of responsibility prescribed by the American Act. This seems to me so plain that I should properly be regarded as unduly astute if I turned my eye away from it. If this initial step is taken, it does not seem to me difficult to make commercial sense

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[4] [1893] A.C. 351; 9 T.L.R. 437.

[5] [1908] A.C. 16; 24 T.L.R. 114.

[6] (1932) 147 L.T. 503.

[7] (1937) 53 T.L.R. 650.

[8] (1926) 24 Ll.L.Rep. 374.

[9] [1957] 2 Q.B. 233, 248; [1957] 2 W.L.R. 509; [1957] 1 All E.R. 673.

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of the agreement, though I would not dissent from Parker L.J.'s description of it as a "jumble of provisions."

For the reasons that I have given I would answer the supplementary questions of law put to the learned judge as follows: (1) Yes. (2) (*a*) Yes. (2) (*b*) Yes. (3) No.

It follows, I think, that the question of law stated by the umpire in paragraph 56 of the special case, the opening words of which have been by agreement varied so as to run as follows: "Whether upon the facts as found and upon the true construction of the charterparty the owners are in breach of the charterparty, and in so far as they are in breach are not protected from loss or damage of the kind claimed resulting therefrom," should be answered as follows: (1) to (3) No. (5) to (9) No. The fourth head of the question relates to the period following the vessel's departure from Curaçao on August 19 when (as it was found) she was not seaworthy in respect of her machinery and due diligence had not been exercised to make her seaworthy. The answer to (4) should therefore be Yes. The tenth head covers the voyage from Curaçao on August 19. An unqualified negative cannot, therefore, be given. It must be qualified by the extent to which the failure in convenient dispatch was due to the admitted breach to which I have referred. The answer to (11) is No.

LORD MORTON OF HENRYTON. My Lords, I have reached the same conclusion as the Court of Appeal, although I have reached that conclusion by a different line of reasoning. I find it convenient to refer to the appellants as "the owners" and to the respondents as "the charterers."

On May 25, 1950, the charterers chartered a tanker belonging to the owners, by a voyage charterparty to remain in force for as many consecutive voyages as the vessel could perform within a period of 18 months. The first voyage began on July 27, 1950, when the vessel left Baltimore in ballast to load her first cargo at Curaçao. On the way there her machinery broke down and she had to be taken in tow to San Juan, where certain repairs were effected. Other similar incidents occurred at different stages of her service, and the result was that she lost in all 106 days. The charterers claimed damages which they estimated at over £80,000, the claim being for the difference between the charter and market rates of freight on cargo carrying voyages which might have been performed within the 18 months if the vessel had been continuously fit for service.

The claim went to arbitration, and the umpire has made a series of findings to the effect that the breakdown of the vessel's machinery was due to the incompetence of the engine-room staff, and that the vessel was unseaworthy at various stages of her voyages owing to such incompetence. He found, however, that due diligence had been exercised by the owners in the selection and appointment of their staff.

No question as to the amount of damages arises on this appeal, but it is clear that the owners are liable in damages to the charterers unless they are protected by clause 52 of the charterparty and a " paramount clause " which is thereby incorporated in the charterparty. These clauses are in the following terms:

" 52. It is agreed that the Chamber of Shipping War Risks " Clauses dated April, 1937, New Jason Clause, Paramount " Clause, and Both to Blame Collision Clause, as attached, are " to be incorporated in this charterparty."

" *Paramount Clause.* This bill of lading shall have effect " subject to the provisions of the Carriage of Goods by Sea Act " of the United States approved April 16, 1936, which shall be " deemed to be incorporated herein, and nothing herein contained " shall be deemed a surrender by the carrier of any of its rights " or immunities or an increase of any of its responsibilities or " liabilities under said Act. If any term of this bill of lading be " repugnant to said Act to any extent, such item shall be void to " that extent but no further."

Four questions of construction arise upon these clauses, which were stated by Devlin J. as follows: " (1) Whether the United " States Carriage of Goods by Sea Act (hereinafter called ' the " ' Act ') affects the rights and liabilities of the parties under the " charterparty. (2) If the answer to (1) is ' Yes,' whether under " the charterparty any material provisions of the Act affect the " rights and liabilities of the parties in connection with (*a*) non- " carrying voyages; (*b*) cargo-carrying voyages other than " those to or from ports in the United States of America. (3) Do " the words ' loss or damage ' in section 4 (1) and/or section 4 (2) " of the Act relate only to physical loss of or damage to goods? "

The learned judge answered these questions as follows: (1) Yes. (2) (*a*) No. (2) (*b*) Yes. (3) No.

As the owners were claiming that the Act had the effect of exempting them from liability for the unseaworthiness of the ship, it is obvious that the answers to questions (1), (2) (*b*) and (3) were in favour of the owners, while the answer to (2) (*a*) was in favour of the charterers.

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The Court of Appeal answered the first question in the negative, and accordingly the remaining questions did not arise. They held that the paramount clause could not sensibly be applied to this charterparty, since it was impossible to feel sure what provisions in the Act were to be treated as incorporated, and what was the effect of the incorporation.

My Lords, I must now approach the construction of the relevant documents and endeavour to answer the four questions already stated. In approaching this task I shall bear in mind, and strive to apply, three well-known principles of construction, to which reference was made in the course of the argument. The first principle is stated by Lord Wright in *Hillas & Co. Ltd.* v. *Arcos Ltd.*[10] in words which have often been quoted: "Business men often record the most important agreements in "crude and summary fashion; modes of expression sufficient and "clear to them in the course of their business may appear to "those unfamiliar with the business far from complete or precise. "It is accordingly the duty of the court to construe such docu"ments fairly and broadly, without being too astute or subtle in "finding defect; but, on the contrary, the court should seek to "apply the old maxim of English law, Verba ita sunt intelligenda "ut res magis valeat quam pereat." These observations were made in a case where the question was whether a contract had been made; but Mr. Roskill, for the owners, submitted that they were equally applicable to the construction of a concluded contract, and I agree.

Lord Wright then goes on to state the second well-known principle as follows [10]: "That maxim, however, does not mean that the "court is to make a contract for the parties, or to go outside the "words they have used, except in so far as there are appropriate "implications of law, as for instance, the implication of what is "just and reasonable to be ascertained by the court as matter of "machinery where the contractual intention is clear but the "contract is silent on some detail."

The third principle was stated by Lord Loreburn in *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*[11]: "The law "imposes on shipowners a duty to provide a seaworthy ship and "to use reasonable care. They may contract themselves out of "those duties, but unless they prove such a contract the duties "remain; and such a contract is not proved by producing "language which may mean that and may mean something

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[10] 147 L.T. 503, 514.

[11] [1908] A.C. 16, 19–20.

"different"; and he added [12]: "I am afraid it is useless to draw "the attention of commercial men to the risks they run by using "confused and perplexing language in their business documents. "Courts of law have no duty except to construe them when a "question arises; but it is often very difficult. And sometimes "what the parties really intended fails to be carried out because "ill-considered expressions find their way into a contract."

Approaching the first of the four questions already stated with these principles in mind, I answer it in the affirmative. The paramount clause is clearly incorporated in the charterparty, and I agree with Devlin J. that the opening words of the paramount clause must be treated as corrected so as to read: "This charter-"party shall have effect subject to," etc. The paramount clause has in fact become one of the clauses of the charterparty, by virtue of clause 52 thereof, and it does not make sense to begin a clause of a charterparty with the words "This bill of lading."

Turning to the provisions of the Act, I agree again with the learned judge that the words in section 5, "The provisions of the "Act shall not be applicable to charterparties," must be rejected as being meaningless. The clause paramount says that the provisions of the Act shall be deemed to be incorporated in the charterparty, but it is meaningless to incorporate in the charterparty a provision that the Act shall not apply to charterparties.

I now turn to question (2) (*a*). The only relevant voyage on which the vessel was not carrying cargo was the initial voyage from Baltimore to Curaçao, and the question is whether the material provisions of the Act apply to that voyage. My Lords, in agreement again with Devlin J., I would answer that question in the negative. The provisions upon which the owners particularly rely as exempting them from liability for the unseaworthiness of the vessel on that voyage are in section 4 (1) and (2) of the Act. This section is headed "Rights and Immunities." Section 4 (1) is as follows: "Neither the carrier nor the ship "shall be liable for loss or damage arising or resulting from "unseaworthiness unless caused by want of due diligence on the "part of the carrier to make the ship seaworthy, and to secure "that the ship is properly manned, equipped, and supplied, and "to make the holds, refrigerating and cool chambers, and all "other parts of the ship in which goods are carried fit and safe "for their reception, carriage, and preservation in accordance "with the provisions of paragraph (1) of section 3. Whenever

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[12] [1908] A.C. 16, 20.

"loss or damage has resulted from unseaworthiness, the burden "of proving the exercise of due diligence shall be on the carrier "or other persons claiming exemption under this section." The relevant part of subsection (2) is as follows: "Neither the "carrier nor the ship shall be responsible for loss or damage "arising or resulting from—(*a*) Act, neglect, or default of the "master, mariner, pilot, or the servants of the carrier in the "navigation or in the management of the ship; . . ."

My Lords, it is clear that, on the facts as found, these words would exempt the owners from liability in the case of the initial voyage if they applied to that voyage; but, in my opinion, section 4 only applies to a case in which the ship is being used for the carriage of goods. In order to make good this statement, I must refer to the earlier portions of the Act, which impose certain "responsibilities and liabilities" set out in section 3 and grant the "rights and immunities" granted by section 4. Sections 1 and 2 are in the following terms:

Section 1: "When used in this Act—(*a*) The term 'carrier' "includes the owner or the charterer who enters into a contract of "carriage with a shipper. (*b*) The term 'contract of carriage' "applies only to contracts of carriage covered by a bill of lading "or any similar document of title, in so far as such document "relates to the carriage of goods by sea, including any bill of "lading or similar document as aforesaid issued under or "pursuant to a charterparty from the moment at which such bill "of lading or any similar document of title regulates the relations "between a carrier and a holder of the same. (*c*) The term "'goods' includes goods, wares, merchandise, and articles of "every kind whatsoever, except live animals and cargo which by "the contract of carriage is stated as being carried on deck and is "so carried. (*d*) The term 'ship' means any vessel *used for the* "*carriage of goods by sea*. (*e*) The term 'carriage of goods' "covers the period from the time when the goods are loaded on "to the time when they are discharged from the ship."

Section 2 (Risks.): "Subject to the provisions of section 6" (which are immaterial for the present purpose) "under every "contract of carriage of goods by sea, the carrier in relation to "the loading, handling, stowage, carriage, custody, care, and "discharge of such goods, shall be subject to the responsibilities "and liabilities and entitled to the rights and immunities herein- "after set forth."

By the paramount clause, the provisions just quoted are deemed to be incorporated in the charterparty. It is only by virtue of section 2 that the rights and immunities on which the owners rely can come into operation, since it is section 2 which confers these rights and immunities; and it is impossible to incorporate section 4 in the charterparty without also incorporating the section which provides that the "carrier" shall be entitled to the rights and immunities set forth in section 4.

Applying section 2 to the present charterparty, which is, of course, a contract for the carriage of goods by sea, the section only brings these rights and immunities into operation in regard to a period from the time when goods are loaded on to the time when they are discharged from the ship. That is the only period covered by the term "carriage of goods"—see section 1 (*e*)—and it is only under a contract of carriage of goods by sea, and *in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods* that the rights and immunities specified in clause 4 are conferred upon the owner by section 2. For these reasons, my Lords, in agreement with Devlin J. I would answer question (2) (*a*) in the negative, so that the owners are not protected in regard to the initial voyage from Baltimore to Curaçao. Mr. Roskill, for the owners, sought to rely upon the decision of a Divisional Court in *Golodetz* v. *Kersten, Hunik & Co.*,[13] but that case is of no assistance to him for reasons which I shall state later. For the moment, I shall only point out that the words which I have quoted from sections 1 (*e*) and 2 are not "insensible" when applied to this charterparty, and they are not ambiguous words. They cannot be rewritten because they may appear to have a somewhat capricious result in limiting the protection of the owners to cargo carrying voyages.

Question (2) (*b*) gives rise to a more difficult question of construction, but, in my opinion, this question must also be answered against the owners. I turn to section 13 of the Act, the relevant portion whereof is as follows: "This Act shall apply to all "contracts for carriage of goods by sea to or from ports of the "United States in foreign trade. As used in this Act the term "'United States' includes its districts, territories, and possessions . . . The term 'foreign trade' means the transportation "of goods between the ports of the United States and ports of "foreign countries. Nothing in this Act shall be held to apply "to contracts for carriage of goods by sea between any port of "the United States or its possessions, and any other port of "the United States or its possessions." Then follow some provisos which need not be set out. It will be observed that I have not referred to the preamble to the Act, either in considering question (2) (*a*) or in considering the present question. Mr. Mocatta, for the charterers, sought to gain assistance from the words of the preamble, which are as follows: " . . . every bill of " lading or similar document of title which is evidence of a con- " tract for the carriage of goods by sea from ports of the United " States, in foreign trade, shall contain a statement that it shall " have effect subject to the provisions of this Act." I do not, however, think it is legitimate to limit the scope of the provisions of the Act by the words just quoted, since it is the " provisions " of the Act," and nothing but the provisions of the Act, which are incorporated in the charterparty now under consideration.

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[13] 24 Ll.L.Rep. 374.

Turning again to section 13, it may be said, on behalf of the owners, that the opening sentence of the section does not expressly exclude contracts for carriage of goods by sea to and from ports outside the United States. That is so, but I think that the section, on its more natural construction, is in fact intended to limit the application of the Act to contracts for carriage of goods to and from ports of the United States. If it was not intended to have this effect, it is difficult to see why it should appear in the Act at all. It is to be noted that the parties have not chosen to incorporate the Hague Rules, as they might have done. They have chosen to incorporate, by the paramount clause, the provisions of a United States Act. They must take these provisions as they find them, unless they are " insensible " if incorporated in the charterparty. An example of insensibility is provided by the words in section 5 of the Act, already quoted: " The provisions of the Act shall not be applicable to charter- " parties." But the words now under consideration are not insensible when read in conjunction with the provisions of the charterparty. The case might be otherwise if the only voyages permitted under the charterparty were voyages between, for instance, England and Abadan. This is not, however, the position, for the vessel started from Baltimore, U.S.A., and clause 49 provides: " Charterers have the option of ordering the vessel " to discharge at United States ports subject to owners securing " United States Maritime Commission approval and owners " undertake to do their utmost to secure this permission should " charterers desire to exercise their option."

The present case is, therefore, entirely different from *Golodetz* v. *Kersten, Hunik & Co.*[13] already mentioned. That case related to a bill of lading for the carriage of goods from Rotterdam to London. The parties had incorporated " all the terms provisions " and conditions of the Carriage of Goods by Sea Act, 1924, and " the Schedule thereto," but that Act was limited to voyages which did not include a voyage from Rotterdam to London. The court was thus faced with the same position as arose in the present case in regard to the words already quoted from section 5 of the Act, and all your Lordships are of opinion that these words must be rejected as insensible.

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[13] 24 Ll.L.Rep. 374.

In answering question (2) (*b*) in the negative, as I do, I am differing, for the first time, from the conclusions of Devlin J. The learned judge points out that[14]: " There is a wide range of " ports in the charterparty and if the immunity were to relate " only to voyages to and from American ports, the effect of it " would be considerably cut down." That is quite true, but if the words used in the Act, and incorporated in the charterparty, mean that the immunity covers only voyages to and from United States ports, it is impossible either to strike them out or alter them. To do so would be to make a new contract for the parties.

Mr. Roskill relied upon the case of *Glynn* v. *Margetson & Co.*,[15] and especially upon the words of Lord Halsbury: " Look- " ing at the whole of the instrument, and seeing what one must " regard, for a reason which I will give in a moment, as its main " purpose, one must reject words, indeed whole provisions, if " they are inconsistent with what one assumes to be the main " purpose of the contract. The main purpose of the contract " was to take on board at one port and to deliver at another port " a perishable cargo." Lord Herschell, who delivered the only other speech in that case, did not express himself in such wide terms, but even if Lord Halsbury's words are given their full effect, they do not assist the shipowners in the present case, for three reasons. First, the provisions now under consideration are not " inconsistent with the main purpose of the contract." They are only inconsistent with protection being given to the shipowner in the case of voyages to or from ports outside the United States. The main object of the contract is not to provide protection for the owners on any voyage or voyages; it is to provide for the carriage of goods by sea. Secondly, Lord Halsbury said, immediately after the passage which I have already quoted[15]: " I do not think the learned counsel who argued this case on the " part of the appellants gave sufficient effect in the argument

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[14] [1957] 2 Q.B. 233, 250.

[15] [1893] A.C. 351, 357.

"which he addressed to your Lordships to the difference between "the ordinary and formal parts of the document which are to "be found in print and the written parts." In the case of *Glynn* v. *Margetson & Co.*[16] this House, in effect, rejected some of the words in a printed clause which were quite inconsistent with the main purpose of the contract. In the present case the words which are sought to be struck out were inserted into the contract by a special clause described as a "paramount clause." Thirdly, their Lordships were clearly influenced by the consideration that the goods to be carried were perishable.

What, then, is the result of my answering question (2) (*a*) and question (2) (*b*) in the negative? The only voyages under the charterparty which are relevant in the present case are (i) the voyage from Baltimore to Curaçao, which is not covered by the Act because it is not a cargo carrying voyage; and (ii) other voyages which are not covered by the Act because they are not voyages to or from United States ports. The result is that the paramount clause, incorporating the Act, gives the owners no protection in the circumstances of the present case, and it becomes irrelevant to consider question (3): whether "the words "'loss or damage' in section 4 (1) and/or section 4 (2) of the "Act relate only to physical loss of or damage to goods."

I would add this in regard to questions (2) (*a*) and (2) (*b*). It may be that the parties intended to incorporate in the charterparty only sections 3 and 4 of the Act, and to incorporate them without the limitations imposed by sections 1 (*e*), 2 and 13, so that they would apply to all voyages within the scope of the charterparty. If this was the result which they wished to achieve, I can think of more than one simple way in which they could have achieved it; but, to my mind, they have failed to achieve it by the paramount clause, and your Lordships cannot help the owners to achieve it by redrafting the paramount clause and the Act so as to make a new contract for the parties.

Even if it is possible so to read the paramount clause and the Act as to apply sections 3 and 4 to all voyages, I would pray in aid the words of Lord Loreburn in *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*[17] already quoted, and of Lord Wright in the *Petrofina* case[18]: ". . . if it is sought to effect a reduc"tion of the overriding obligation to provide a seaworthy ship, "whether that is express or implied for this purpose does not "matter, by other express terms of the charterparty or contract

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[16] [1893] A.C. 351.

[17] [1908] A.C. 16, 19–20.

[18] 53 T.L.R. 650, 653.

"of affreightment, that result can only be achieved if perfectly "clear, effective, and precise words are used expressly stating that "limitation." Can it be said, my Lords, that in the present case the paramount clause, incorporating the Act, limits the obligation to provide a seaworthy ship in words which are "perfectly "clear"? Or have the parties used language which (as Lord Loreburn put it) "may mean that and may mean something "different"? If so, the owners must be held liable, even if your Lordships do not accept my construction of the relevant words.

For the reason which I have stated, I would answer questions (1) to (9) in paragraph 56 of the special case in the affirmative, and would uphold the award of the umpire, in paragraph 57, that the owners are liable to the charterers. This is the conclusion at which the Court of Appeal arrived, for different reasons.

Lord Reid. My Lords, clause 22 of the charterparty provides: "It is agreed that the Chamber of Shipping War Risks Clauses "dated April, 1937, New Jason Clause, Paramount Clause, and "Both to Blame Collision Clause, as attached, are to be incor-"porated in this charterparty." This case turns on the proper interpretation of the paramount clause which is thereby incorporated. The paramount clause begins: "This bill of lading shall "have effect subject to . . . ", and the first question is what is meant by "This bill of lading."

As it stands "This bill of lading" does not make sense, but no one suggests that the parties by mistake attached the wrong form of clause to the charterparty. They intended to attach this clause and they must have intended it to mean something. It was argued that it was meant to be a clause which the charterers were to be bound to include in any bill of lading, and that it was not meant to affect the charterparty itself. I can find no ground for this argument—particularly when I find that in both the New Jason Clause and the Both to Blame Collision Clause there are provisions introduced by the words: "The charterers shall pro-"cure that all bills of lading issued under this charterparty shall "contain the following clause." To give effect to this argument it would be necessary to read in at the beginning of the paramount clause these or similar words. This could only be done if there was some clear indication elsewhere that it must be done, and there is nothing anywhere to show that this was the intention.

If the paramount clause is to have any meaning or effect at all "This bill of lading" must be held to be a misnomer for "This "charterparty." I find nothing to raise any doubt that this was the intention, and the fact that clause 52 directs that the paramount clause is to be " incorporated " in the charterparty appears to me to be a clear pointer that its initial words must be so read. So reading them, the paramount clause provides: " This charter-" party shall have effect subject to the provisions of the Carriage " of Goods by Sea Act of the United States, approved April 16, " 1936, which shall be deemed to be incorporated herein, and " nothing herein contained shall be deemed a surrender by the " carrier of any of its rights or immunities or an increase of any " of its responsibilities or liabilities under said Act. If any term " of this charterparty be repugnant to said Act to any extent such " term shall be void to that extent, but no further." This is a plain and unequivocal direction to incorporate in the charterparty " the provisions " of the United States Act so that, if any other term of the charterparty is to any extent repugnant " to said " Act," it shall be void to that extent but no further. I note that there must be repugnancy to the United States Act—not to some particular section of it.

The first difficulty arises from the provisions of section 5 of the United States Act: " The provisions of the Act shall not be " applicable to charterparties; but if bills of lading are issued in " the case of a ship under a charterparty, they shall comply with " the terms of this Act." The Act only deals with bills of lading: it begins: " Be it enacted by the Senate and House of Represen-" tatives of the United States of America in Congress assembled, " that every bill of lading or similar document of title which is " evidence of a contract for the carriage of goods by sea to or " from ports of the United States, in foreign trade, shall have " effect subject to the provisions of this Act."

This case appears to me to raise in an acute form the question how far a court is entitled to go in disregarding words in a contract in order to discover the intention of the parties. It is difficult to see how anyone who had given any thought to the provisions of the United States Act could have drafted this paramount clause for inclusion in a charterparty: it must have been drafted for inclusion in a bill of lading where it would be quite appropriate. But it appears that for a considerable time a clause in substantially this form has been included in a number of charterparties. We do not know how this practice originated, and we do not know and are not entitled to guess just what the parties had in mind when they agreed to incorporate the clause in this charterparty. The intention of the parties can only be inferred from the words which they have used. Undoubtedly the charterparty must be read as a whole, and any term in it must be read in light of the general nature of the contract, of the fact that the contracting parties were business men, and of all relevant facts known to the parties when it was made. But in the end we must take the words which the parties have used, and interpret them.

As the parties have chosen to incorporate in a charterparty provisions which are designed to apply, and only to apply, to bills of lading, one must, I think, infer that they intended these provisions to be incorporated mutatis mutandis; and in order to see what this involves I would begin by trying to read references to bills of lading in the Act as if they were references to charterparties. That necessarily involves the rejection as insensible of the provisions of section 5 of the Act that its provisions shall not be applicable to charterparties, and I find little difficulty in taking that step.

Then there are a number of provisions in the Act which, from their very nature, can only apply to bills of lading, and which become meaningless if one tries to make them apply to a charterparty. It probably does not matter much whether or not one regards them as incorporated in the charterparty. Some of them might throw some light on other provisions which must be incorporated, but I am content to take the case on the footing that they are not incorporated. There are also sections of the Act which permit parties to agree to vary statutory rights and liabilities in certain cases, and permit the Government of the United States to modify the terms of the Act in certain circumstances. These, too, are meaningless if incorporated in this charterparty and I disregard them.

That leaves to be incorporated those parts of the Act which enact the rights and liabilities of carrier and shipper, and which are capable of being applied to a charterparty if one reads owner and charterer for carrier and shipper. That appears to me to be quite consistent with the second part of the paramount clause, which must mean that nothing in the charterparty shall be deemed a surrender by the carrier (the owner) of any of his rights or immunities or an increase of any of his responsibilities or liabilities under the Act. The question is what are the carrier's rights, immunities, responsibilities or liabilities under the Act which can apply to an owner vis-à-vis a charterer. The purpose of the paramount clause is to preserve them—not to extend them.

The first part of the Act which I have already quoted shows, as one might expect, that the Act only applies where there is carriage of goods to or from a port of the United States: and this is confirmed by section 13 which provides: "This Act shall apply "to all contracts for carriage of goods by sea to or from ports of "the United States in foreign trade." Accordingly, a carrier can have no rights or liabilities under the Act except in relation to a voyage to or from the United States, and, if this paramount clause had been incorporated in a bill of lading, a term in the bill of lading repugnant to the Hague Rules as embodied in the Act would not be repugnant to the Act if the goods were not being carried to or from the United States. One of the difficult questions in this case is whether a term of this charterparty, which is repugnant to a part of the Act capable of being applied to a charterparty, can be regarded as "repugnant to said Act" within the meaning of the paramount clause as regards a voyage which is neither to nor from a United States port. It must be borne in mind that the paramount clause expressly provides that if any term of the charterparty is repugnant to the Act to any extent it shall be void to that extent but no further. It was therefore expressly contemplated that a term in the charterparty might be invalidated to some extent but yet remain valid when the circumstances were not within the scope of the paramount clause. There are terms in the charterparty which would admittedly prevent the appellant from succeeding unless they are excluded by the paramount clause in the circumstances of this case.

Then section 2 of the Act provides, subject to an immaterial exception, ". . . under every contract of carriage of goods by sea, "the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject "to the responsibilities and liabilities and entitled to the rights "and immunities hereinafter set forth"; and section 7 provides: "Nothing contained in this Act shall prevent a carrier or a shipper "from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the "carrier or the ship for the loss or damage to or in connection "with the custody and care and handling of goods prior to the "loading on and subsequent to the discharge from the ship on "which the goods are carried by sea." So it is plain that under the Act a carrier can have no rights or liabilities except in relation to a cargo carrying voyage. A second difficult question in this case is whether a term of this charterparty, which is repugnant to a part of the Act capable of being applied to a charterparty, can be regarded as "repugnant to said Act," within the meaning

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of the paramount clause as regards a voyage when no cargo is carried.

Sections 3 and 4 of the Act set out respectively the responsibilities and liabilities, and the rights and immunities of the carrier. Section 3 (1) provides: "The carrier shall be bound, "before and at the beginning of the voyage, to exercise due "diligence to—(*a*) Make the ship seaworthy; (*b*) Properly man, "equip, and supply the ship; (*c*) Make the holds, refrigerating "and cooling chambers and all other parts of the ship in which "goods are carried, fit and safe for their reception, carriage, and "preservation." The other provisions of the sections are either from their nature incapable of application to a charterparty or difficult to apply to a charterparty without considerable modification. The appellant admits that "at the beginning of the "voyage" in section 3 (1) must mean at the beginning of each voyage under this charterparty and not the beginning of the first voyage under it. Head (*c*) of section 3 (1) causes some difficulty for the appellant because, if this subsection is to apply to voyages when no cargo is carried, it would seem unreasonable that head (*c*) should apply to such voyages: on the other hand, it would apply when cargo was to be carried.

Section 4 provides: "(1) Neither the carrier nor the ship shall "be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part "of the carrier to make the ship seaworthy, and to secure that "the ship is properly manned, equipped, and supplied, and to "make the holds, refrigerating and cool chambers, and all other "parts of the ship in which goods are carried fit and safe for their "reception, carriage, and preservation in accordance with the "provisions of paragraph (1) of section 3. Whenever loss or "damage has resulted from unseaworthiness, the burden of "proving the exercise of due diligence shall be on the carrier "or other persons claiming exemption under this section. "(2) Neither the carrier nor the ship shall be responsible for "loss or damage arising or resulting from—(*a*) Act, neglect, or "default of the master, mariner, pilot, or the servants of the "carrier in the navigation or in the management of the ship ". . ." and a number of other matters most of which are readily applicable to a charterparty.

I do not think that I misrepresent the case for the appellant in saying that it is that, in spite of the wording of the paramount clause, no part of the United States Act should be incorporated in this charterparty except those parts of sections 3 and 4 of the

Act which are readily applicable to a charterparty, and that then the provisions so incorporated should be read in their new context without paying regard to the limited extent of the rights which they confer in their original context in the Act. In that way these provisions can be made to apply to voyages which are neither to nor from a United States port, and to voyages when no cargo is carried—voyages to which, in their original setting in the Act, these provisions could never have any possible application. The respondent, on the other hand, in addition to supporting the reasoning of the Court of Appeal, maintains that, if any part of the Act is to be incorporated, the paramount clause requires that every part of the Act which is capable of application to a charterparty must be incorporated so that the provisions on which the appellant relies will still be qualified by the other provisions of the Act to which I have referred and will, therefore, retain their original limited scope and not apply either to voyages which do not touch the United States or to voyages on which no cargo is carried.

The strength of the appellant's case lies in the fact that the method of construction which I have sought to follow produces a result which is commercially unreasonable. It is not credible that, if the parties had really applied their minds to the matter, they would have agreed that the owners should have one standard of duty for cargo carrying voyages to or from the United States and another for all other voyages. Indeed, I am prepared to assume that, if the defects of the paramount clause had been pointed out to the parties, they, or at least any reasonable business men in their position, would have agreed that the relevant provisions of the Hague Rules, as embodied in the United States Act, should apply to all voyages under this charterparty. But it is one thing to say that the parties would have agreed to this and another thing to say that they did agree to it.

We cannot tell what the parties had in mind and we may not inquire as to what was said in the course of negotiation. The parties may have intended—indeed they may have said—that the Hague Rules were to apply to all voyages under the charterparty: they may have chosen this ill-designed clause simply because it had been used before. But they may have been very vague in what they intended or what they said. In any case we are not concerned with what they may have intended or said. We are only concerned with interpreting the words which they chose to use in their contract. I do not think that we are entitled to assume that they must have had a clear intention and that it must have been a reasonable intention, then to find that the only reasonable intention would have been to apply the Hague Rules to all voyages, and to hold that, even if the words which they have used will not bear that construction, that intention must prevail. A court is often entitled to add to a written contract by implying a term if it is satisfied that any reasonable men in the position of the parties would have agreed to it if their attention had been directed to the point and that the term should be implied. But that is supplementing the words which the parties have used—not contradicting them. It might be the law that a court should be entitled to amend the parties' contract if satisfied that no reasonable men could have meant what it says and also satisfied as to what they must have intended to do if, being reasonable men, they had directed their attention to the point. Perhaps that should be the law. But, so far as I am aware, there is no authority for a court having that power. Here the parties made an express provision which is, in my view, incapable of bearing the construction for which the appellant contends, and therefore to give effect to that contention would involve contradicting what the parties have said in their contract and making a new contract for them.

There are many cases where a court must disregard words, including whole terms, which the parties have put in their contract. But those are cases where there is something in the contract itself which makes that course necessary. For example, the words may be inconsistent with the main object of the contract. In *Glynn* v. *Margetson & Co.*[19] a printed clause would have allowed the ship to proceed to and stay at any port within a very wide range in carrying oranges from Malaga to Liverpool. A deviation by the ship caused damage to this perishable cargo and the owners were held liable. Lord Halsbury said[20]: "One must reject words, indeed whole provisions, if "they are inconsistent with what one assumes to be the main "purpose of the contract." And Lord Herschell L.C. said[21]: "Where general words are used in a printed form which are "obviously intended to apply, so far as they are applicable, to "the circumstances of a particular contract, which particular "contract is to be embodied in or introduced into that printed "form, I think you are justified in looking at the main object "and intent of the contract and in limiting the general words "used, having in view that object and intent." I do not think that this principle so applied helps either party. The object of

[19] [1893] A.C. 351.

[20] Ibid. 357.

[21] Ibid. 355.

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the contract in *Glynn's* case [22] was obvious from the contract itself, but here, if a limited application is given to the Hague Rules, I can see no conflict with either the general object of the charterparty or any express term in it. The conflict is only with what one might have expected reasonable people to do. I should perhaps note that an explanation of *Glynn's* case [22] was given by Jenkins L.J. and approved in this House in *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama.*[23]

Then there are numerous cases where two parts of a contract appear to contradict each other. I shall only cite two cases which seem to me to be relevant here. In *Elderslie Steamship Co. Ltd.* v. *Borthwick* [24] Lord Macnaghten said: " The clause " which has been called the large print clause seems to me to " be perfectly clear. The small print clause is equally clear. " For my part I am unable to reconcile the two clauses. In such " a case as this an ambiguous document is no protection. It is " a wholesome rule that a shipowner who wishes to escape the " liability which might attach to him for sending an unseaworthy " vessel to sea must say so in plain words." And in *Nelson " Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*[25] Lord Loreburn L.C. said: " I think the clause, taken as a whole, so " ill thought out and expressed that it is not possible to feel " sure what the parties intended to stipulate. The law imposes " on shipowners a duty to provide a seaworthy ship and to use " reasonable care. They may contract themselves out of those " duties, but unless they prove such a contract the duties remain; " and such a contract is not proved by producing language which " may mean that and may mean something different. As Lord " Macnaghten said in *Elderslie Steamship Co. Ltd.* v. *Borthwick* [26] ' an ambiguous document is no protection.' "

A third class of case is where a term is meaningless or so vague as to be insensible. In *G. Scammell & Nephew Ltd.* v. *Ouston* [27] Lord Wright said: " The object of the court is to do " justice between the parties, and the court will do its best, if " satisfied that there was an ascertainable and determinate " intention to contract, to give effect to that intention, looking at " substance and not mere form. It will not be deterred by mere

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[22] [1893] A.C. 351.

[23] [1957] A.C. 149; [1957] 2 W.L.R. 45; [1956] 3 All E.R. 957.

[24] [1905] A.C. 93, 96; 21 T.L.R. 277.

[25] [1908] A.C. 16, 19–20.

[26] [1905] A.C. 93, 96.

[27] [1941] A.C. 251, 268; 57 T.L.R. 280; [1941] 1 All E.R. 14.

"difficulties of interpretation. Difficulty is not synonymous "with ambiguity so long as any definite meaning can be "extracted. But the test of intention is to be found in the "words used. If these words, considered however broadly and "untechnically and with due regard to all the just implications, "fail to evince any definite meaning on which the court can "safely act, the court has no choice but to say that there is "no contract." In *Nicolene Ltd.* v. *Simmonds* [28] that principle was applied so as to strike out of a contract a term so vague or ambiguous that no ascertainable meaning could be given to it, and to leave the rest of the contract valid.

The Court of Appeal have followed the last class of case and have held that no effect at all should be given to the paramount clause. Denning L.J. (as he then was) said [29]: "If we reject the "obvious contradictions and inconsistencies, and seek to apply "the rest of the Hague Rules in their ordinary meaning, we are "left with such incongruous results that no one can suppose that "the parties ever intended to produce them. If we reject the "contradictions, inconsistencies and incongruities, and put something in their stead, we shall be making for the parties a contract which we may think is reasonable but to which they have "never subscribed, because it would bear no relation to the "written words. And I have good reason for thinking that we "might differ from the judge, and between ourselves, as to what "would be reasonable. This all leads me to the conclusion that "this paramount clause cannot sensibly be applied to this charterparty. It must be rejected as insensible in this setting." Parker L.J. said [30]: "What provisions are to be treated as "incorporated? This charter is, as I have said, for successive "charterparty voyages and worldwide in its scope. It is clearly "not possible to select those provisions which the court thinks "reasonable to apply in all the circumstances. That would be to "make a new contract between the parties. The only safe "method of exclusion would be to reject only those provisions "or parts of provisions which would be insensible. But, if this "is done, one is left with such a jumble of provisions that it is, "in my judgment, quite impossible to feel sure what the parties "intended. Accordingly, I feel constrained to reject the whole "of the paramount clause as insensible." Sellers L.J. said [31]: "On the other hand, to give the clause effect as the shipowners

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[28] [1953] 1 Q.B. 543; [1953] 2 W.L.R. 717; [1953] 1 All E.R. 822.

[29] [1957] 2 Q.B. 233, 269.

[30] Ibid. 269, 271–272.

[31] Ibid. 275.

" submit requires even more imagination and a drastic elimination or substitution of all words which offend against the " applicability of the clause to a charterparty. It seems to me " that this would be doing what the parties did not do themselves, " and would be giving to provisions a certainty and a clarity " which they do not possess. Where the court can be certain " of the contractual intention, then matters which conflict with " the intention may be disregarded as insensible, but if very little " seems to fit in with the accepted provisions of a contract and " a position of uncertainty and doubt arises—as I think it does " here—it would be passing out of the realm of construction if " one proceeded to cull or create contractual terms out of the " muddled material."

I have sympathy with their view, particularly in view of the principle restated by Lord Wright M.R. in the *Petrofina* case [32]: " If it is sought to effect a reduction of the overriding obligation to " provide a seaworthy ship, whether that is express or implied " for this purpose does not matter, by other express terms of the " charterparty or contract of affreightment, that result can only " be achieved if perfectly clear, effective, and precise words are " used expressly stating that limitation." But I am unable to go all the way with them because I think that, whatever be the position with regard to voyages not within the scope of the United States Act, the paramount clause has at least applied the Hague Rules with sufficient clarity to cargo carrying voyages to or from the United States. There might well have been such voyages under this charterparty and the charterers' claims might have arisen solely in respect of such voyages. If they had, I do not think that a court could have refused to the owners the protection of this clause on the ground that in other circumstances which had not arisen the clause might be insensible. But it so happens that no claim arises in this case in respect of a cargo carrying voyage to or from the United States, and therefore I reach the same result as the Court of Appeal but in a different way.

It may appear to some to be " legalistic " to hold that a contract means something which no reasonable business man could have intended. But, if a court is precluded from remaking a contract and is only entitled to construe the words which the parties have used, and the parties choose to use such an ill-designed clause as this, a court may have to tell them that they have produced a very unreasonable result. I would dismiss this appeal.

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[32] 53 T.L.R. 650, 653.

Lord Keith of Avonholm. My Lords, it has been accepted, I think rightly, by all the learned judges who have considered this case, as also by your Lordships, that the words "this bill of "lading" in the paramount clause must be read as "this "charterparty." It would seem to follow that the United States Carriage of Goods by Sea Act must be read for the purposes of this charterparty as if the words in section 5, "The provisions of "the Act shall not be applicable to charterparties" were deleted. The parties have incorporated the Act contractually into their contract of charterparty, and to say that the provisions of the Act shall not apply to their charterparty would render the incorporation nugatory and make no sense of what was intended to be a "paramount clause" in their contract. It is, of course, possible to read a clause in a contract as senseless and read it out of the contract altogether, but in commercial contracts that is a course that the court should be slow to adopt. As stated by Lord Wright in *Hillas & Co. Ltd.* v. *Arcos Ltd.*,[33] it is "the "duty of the court to construe such documents fairly and broadly, "without being too astute or subtle in finding defects; but, on the "contrary, the court should seek to apply the old maxim of "English law, Verba ita sunt intelligenda ut res magis valeat "quam pereat."

Turning to the document incorporated by the paramount clause, namely, the United States Act, one finds, as was to be expected, that it applies only to contracts of carriage of goods by sea covered by a bill of lading or similar document of title, and the outlook of the various sections of the Act is necessarily on such contracts. To give any effect to the contractually incorporated document it must be construed, so far as possible, with reference to a charterparty and not a bill of lading. This is necessarily involved in the step that has already been taken of regarding as inapplicable the words, "The provisions of the Act "shall not be applicable to charterparties." The next step, in my opinion, is to read "contract of carriage" as meaning a contract between a carrier and a charterer and not one between a carrier and a shipper. A charterparty is one form of contract for the carriage of goods by sea. The proper approach in a case of this kind in construing an incorporated document has been laid down by this House in *T. W. Thomas & Co. Ltd.* v. *Portsea Steamship Co. Ltd.*,[34] and in *Hamilton & Co.* v. *Mackie & Sons*,[35] approved in the former case. There may be slight differences in the approach adopted by Lord Esher in *Hamilton & Co.* v. *Mackie & Sons* [35] and that adopted by Lord Gorell and Lord Robson in *T. W. Thomas & Co. Ltd.* v. *Portsea Steamship Co. Ltd.*,[36] but they come, I think, very much to the same thing and achieve the same result. Lord Esher would read in the whole terms of the incorporated document and then treat any term which was inconsistent with the incorporating document as insensible and to be disregarded. Lord Gorell and Lord Robson approach the matter, I think, from the standpoint of reading in so much of the incorporated document as is not inconsistent with the subject-matter of the incorporating document. Lord Robson states the rule [37] "that the terms of the charterparty when incorporated or written "into the bill of lading shall not be insensible or inapplicable to "the document in which they are inserted." In that case it was held that an arbitration clause in a charterparty was not apt to be introduced into a bill of lading and, in spite of an incorporating clause in the bill of lading, should be rejected as inconsistent with the bill of lading. The same difference in approach will be found between Lord Esher M.R. and Lopes L.J. in *Serraino & Sons* v. *Campbell* [38] respectively. Here we have the converse case of deciding how much, or what, should be written in to a charterparty of terms that were intended for a bill of lading.

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[33] 147 L.T. 503, 514.

[34] [1912] A.C. 1.

[35] 5 T.L.R. 677.

Taking section 3 (1) and section 4 (1) and (2) (*a*) by themselves, no difficulty would arise in giving them a literal and effective interpretation as between owner and charterer. Two points, however, are taken, that these provisions do not apply to a ballast, or non-cargo carrying, voyage, and apply only to a voyage to or from a United States port. On the first point, of course, the Act as drawn applied only to cargo voyages because it dealt wholly with contracts of carriage under bills of lading. But ex hypothesi that limitation has gone. The Act is now being applied to a charterparty. A charterparty is a contract for the purpose of the carriage of goods by sea, and I see no difficulty in saying that a voyage in ballast is all part and parcel of and incidental to that purpose. If a chartered ship proceeds to its port of loading, it is, in my opinion, engaged in a voyage relating to the carriage of goods though it is not actually carrying goods at the time. To exclude the carrier in such a case from the obligations and immunities of sections 3 and 4 is merely to assert that the Act applies to contracts for the carriage of goods by sea under bills of lading which are confined to the actual carriage of goods. Reference was made to section 2, but that does not, in my opinion, advance the argument for exclusion of ballast voyages any further. Indeed, it might be said that a voyage under a charterparty in ballast is a voyage under the contract " in relation " to " the loading, handling, stowage, carriage, etc., of goods. True, it does not cover the period from the time when the goods are loaded to the time when they are discharged as mentioned in section 1 (*e*) of the Act, but that clause has no meaning in a charterparty, which covers a much greater scope of time, and may be rejected as inconsistent with the purpose of the charterparty. In this matter I am reluctant to differ from the learned judge. He seems to attach considerable weight to subsection (1) (*c*) of section 3, which imposes the duty to make the holds, refrigerating and cooling chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation. That is no doubt directed to the carriage of goods, but so is a charterparty. And if a ship has not made this provision before she sails for her port of loading, she will have to do so before she takes on a cargo at the port of loading and on each voyage thereafter under the charterparty on which she carries goods. I am not prepared to hold that because section 3 (1) (*c*) is inapplicable to a ship on a ballast voyage, if that be so, the shipowner is therefore placed under greater liabilities than those imposed in other respects under section 3.

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[35] 5 T.L.R. 677.
[36] [1912] A.C. 1.
[37] Ibid. 10.
[38] [1891] 1 Q.B. 283, 289, 301; 7 T.L.R. 174.

The point that a claim to immunity is confined to voyages to or from United States ports is founded on the words in the enacting part of the statute that every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States in foreign trade shall have effect subject to the provisions of this Act, and on the words in section 13 that this Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. But again these words seem to me to have no relevance to the charterparty in this case. Very good reasons can be seen for the United States legislature limiting its Act to goods carried under a bill of lading to or from United States ports. They seem quite inapposite when the Act is introduced contractually into a charterparty covering a very wide range of ports outside the United States. Unless the charterers exercised their option under clause 49 of the charterparty, and in that event the owners secured the approval of the United States Maritime Commission, the ship might never have touched at a United States port after leaving Baltimore on her first voyage. On this point Devlin J. arrived, I think, at the right conclusion.

As to the nature of the loss or damage for which immunity may be claimed, I see no reason for limiting this to physical loss of or damage to goods. Here, again, the force of the argument for such a limitation stems from the fact that the United States Act applied only to goods carried under bills of lading. Even in such a case it does not follow that loss or damage is limited to physical loss of or damage to goods. Section 3 (8) shows that the loss or damage contemplated is " loss or damage to or in connection with " the goods," and it has been held in this House that such loss or damage is not limited to physical loss or damage: *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama.*[39] I proceed, however, on the view that the subject-matter of the contract here was voyages, and loss of voyages naturally falls under the words " loss or damage."

On the view I have taken the point as regards causation of the damage does not arise.

In the result, I would allow the appeal. I agree that the question of law should be answered in the manner proposed by my noble and learned friend on the Woolsack.

LORD SOMERVELL OF HARROW. My Lords, this is an appeal from the order of the Court of Appeal allowing an appeal and dismissing a cross-appeal from an order of Devlin J. on an interim award stated in the form of a special case under sections 14 and 21 (1) (*b*) of the Arbitration Act, 1950.

The respondents were charterers of a tanker, the *Saxon Star*, formerly the *Delaware Sun*, owned by the appellants. The charter was dated May 25, 1950. The charter was for as many consecutive voyages as the vessel could perform within 18 months. The charterers alleged in effect that owing to the owners' breaches of contract the ship was delayed by having to be repaired. As a result of the time lost, she was able to perform fewer voyages than would have been performed but for the delay caused by the breaches alleged. " The charterers," I am quoting from Devlin J.,[40] " claimed damages which they put at over " £80,000, the claim being for the difference between the charter " and the market rates of freight on cargo-carrying voyages which " might have been performed within the 18 months if she had " been continuously fit for service."

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[39] [1957] A.C. 149.

[40] [1957] 2 Q.B. 233, 246.

The umpire, who was dealing only with liability, found that delay was caused by incompetence of the engine-room staff which amounted to unseaworthiness. Delay was also caused on one occasion, at Curaçao, by unseaworthiness in respect of machinery. The umpire found that the owners exercised due diligence in the selection and appointment of the engine-room staff. The owners maintain that was the extent of their liability and therefore they are not liable in respect of delay due to that cause. The umpire found that due diligence had not been exercised in respect of the faulty machinery on the one occasion referred to, and the owners admit their liability in respect of delay due to that cause. The learned umpire set out the questions of law in 11 questions as follows:

[His Lordship set out the questions propounded by the umpire and also the questions agreed by the parties before Devlin J., and continued:] On the last question your Lordships were asked to consider whether the words "loss or damage" covered the damages as claimed in this case.

The charterparty starts with a printed form headed "Tank "Vessel Voyage Charterparty," with, of course, typewritten insertions. Typewritten clauses 24 and 52 are attached. Clause 52 is as follows: "It is agreed that the Chamber of Shipping War "Risks Clauses dated April, 1937, New Jason Clause, Paramount "Clause, and Both to Blame Collision Clause, as attached, are to "be incorporated in this Charterparty."

The clause headed "Paramount Clause" is as follows: "*Paramount Clause*. This bill of lading shall have effect subject "to the provisions of the Carriage of Goods by Sea Act of the "United States, approved April 16, 1936, which shall be deemed "to be incorporated herein, and nothing herein contained shall "be deemed a surrender by the carrier of any of its rights or "immunities or an increase of any of its responsibilities or "liabilities under said Act. If any term of this bill of lading be "repugnant to said Act to any extent, such term shall be void to "that extent, but no further."

It is, I think, relevant to set out quite shortly the history of the provisions embodied in this and other similar Acts.

The object of the Brussels Convention, which led to the Hague Rules, which led to the Act, was to produce standard provisions of liability as between shipowner or carrier and shipper. The desirability of standard terms for bills of lading which pass from hand to hand like negotiable instruments had long been felt. The provisions in relation to English law relieved the shipowner of his absolute obligation to provide a seaworthy ship. This was replaced by a duty to exercise due diligence to provide a seaworthy ship. The shipowner was placed under a duty to exercise due diligence in other matters connected with the carriage. He was allowed maximum exceptions to his liability which he could not increase.

The Rules did not apply to charterparties. Charterparties do not pass from hand to hand, and parties were therefore left free to contract on what terms they chose. It was thought at one time that the Rules might be left to be embodied by agreement, as was done with the York-Antwerp Rules on General Average of 1890 (Scrutton on Charterparties, 16th ed., p. 454). Later it was decided that countries should, if so minded, legislate. Our own Carriage of Goods by Sea Act was passed in 1924 and the United States Act in 1936. The United States had led the way in this field by the Harter Act of 1893.

Legislation embodying the Rules with or without modification did not, of course, cover charterparties and could not go beyond shipments which were or came within the jurisdiction of the legislating country. The United Kingdom Act applies to ships carrying goods from any port in Great Britain or Northern Ireland. The United States Act applies (subject to exceptions which are not relevant here) to contracts for carriage of goods to or from ports of the United States.

This short summary is, I hope, useful in emphasising how natural it was that parties concerned in the carriage of goods by sea should wish to embody this code of obligations, the product of much thought and experience, in contracts to which it would not be applicable by legislation. This would apply to all charterparties and to bills of lading which were not within the geographical limits of any country's legislation.

One might have expected that in such cases the parties would embody the "Rules." The practice clearly grew up at an early date of referring to one or other of the Acts as incorporated. On the issue which comes before your Lordships I have been greatly influenced by the decision in *Golodetz* v. *Kersten, Hunik & Co.*[41] and the fact that that decision has stood unchallenged for 30 years. The shipper in that case sued on a bill of lading for goods to be carried from Rotterdam to London. The clause to be construed was as follows: "All the terms, provisions and conditions "of the Carriage of Goods by Sea Act, 1924, and the schedule

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[41] 24 Ll.L.Rep. 374.

"thereto are to apply to the contract contained in this bill "of lading, and the carriers are to be entitled to the benefits of "all the privileges, rights and immunities contained in such Act, "and the schedule thereto, as if the same were herein specifically "set out . . ." If the words "all the terms," etc., are given their literal meaning, the Act did not apply at all, as the voyage was not one from a United Kingdom port. The provision would have been wholly ineffective. Stopping there in the clause, Bankes L.J. was doubtful but said [42]: "I am inclined to think "that what they really intended was that, although this is an "inward bill of lading, it should be treated as an outward bill of "lading, and that the clauses *so far as they are applicable*" (my italics) "should be read into the contract." He was fully satisfied, as was the other member of the court, Warrington L.J., that this was the effect of the clause by the words which followed: "If, or to the extent that, any term of this bill of lading is "repugnant to or inconsistent with anything in the schedule it "shall be void." Similar words occur in the present clause.

I have no doubt that that decision gave effect to the intention of the parties as shown by the words used. It would have been better if they had referred to the Rules scheduled to the Act rather than to the Act. Since that date the incorporation of one or other "Acts" has unfortunately continued. Devlin J. referred to it as very common.

The first point taken by the charterer is based on the opening words of the paramount clause: "This bill of lading . . ." I agree with the learned judge that the answer to this point is an application of the principle falsa demonstratio non nocet. I have nothing I wish to add to his conclusion on this point. The opening words of the paramount clause are to be read as if they were: "This charterparty."

I also agree with the learned judge on the second point based on the provision in section 5 of the Act that the Act shall not be applicable to charterparties. He said [43]: "Since the clause para- "mount says that this charterparty shall be subject to the Act, "it is insensible to incorporate into the clause paramount a "condition which says that the Act shall not apply to charter- "parties." The provisions of the Act are, therefore, to be incorporated as terms of the contract *as far as applicable*. This is to apply the principle laid down in *Golodetz* v. *Kersten, Hunik & Co.* [44]

[42] 24 Ll.L.Rep. 374, 375.

[43] [1957] 2 Q.B. 233, 250.

[44] 24 Ll.L.Rep. 374.

The contract is one for shipment to or from a very wide range of ports. Although the vessel started from Baltimore it might never again be ordered to a United States port. Further, once one has come to the conclusion that the " Act " is being incorporated in a contract to which it does not as an Act apply, one prima facie rejects the limitations which are imposed in these various Acts necessitated by the limits of the legislative jurisdiction of the country concerned. One takes the geographical limits from the contract. I have, therefore, little difficulty in holding that the paramount clause is not to be restricted to the first voyage—though this is also subject to the next point—and the off-chance of the ship being ordered to a United States port later.

The learned judge decided that the paramount clause had no application to ballast voyages. This would exclude the first voyage from Baltimore to the first port of loading. There is, of course, no difficulty in applying to a ballast voyage the " liabilities " or immunities " of the carrier under what I may call the substantive provisions of the Act. It is, however, said, and with force, that the Act is dealing with cargo. On the other hand, its provisions, so far as applicable, have been incorporated into a charterparty where the contractual relations cover a period of voyages the first of which was, and several of which might be, ballast voyages. The paramount clause not only diminishes the shipowners' responsibility at common law but also the responsibility which he would have under the document to which the clause being considered is paramount. It would be a foolish consequence if the shipowner was under a greater liability when the ship was in ballast than when it was carrying cargo. It is natural, as I have said, that shipowners and cargo owners should intend to incorporate the code of obligations and immunities over the whole of the contractual period. The learned judge was, in the main, I think, influenced by the provision in section 3 (1) (*c*) of the Act putting an obligation on the shipowner to use due diligence to make the holds, etc., fit for the reception of cargo. " If," he says,[45] " this obligation attaches at the time when the " ship leaves in ballast for the port of loading it would in many " cases, probably in most, impose an unreasonable and unneces" sary burden on the owner." Section 3 has now to be applied as embodied in a contract under which there will be cargo carrying and non-cargo carrying voyages. One has, therefore, to read

[45] [1957] 2 Q.B. 233, 252.

"voyage" in section 3 (1) in the plural, and so doing it is, I think, natural to read section 3 (1) (*c*) as applicable to the cargo carrying voyages but not to the others. I have therefore come to the conclusion that the provisions of the Act as to the shipowners' obligations apply under the clause paramount to all voyages.

I agree with the learned judge that "loss or damage" in the Act is not limited to physical damage to the goods. I also agree that the loss or damage must arise in relation to the "loading, "handling, stowage, carriage, custody, care and discharge of "such goods." The form of the claim here depends, of course, on the fact that the provisions of the Act have been incorporated into a charterparty for successive voyages. Under a contract with a particular shipper later to be evidenced by a bill of lading issued to him or under a "received for shipment" bill of lading the shipper or prospective shipper might have a similar kind of claim; if, for example, the shipowner failed to ship the goods and freights had risen. The claim is, in my opinion, in relation to loading and carriage of goods and this point, therefore, also fails.

The last point was stated in these words in the respondents' reasons. "If the Act did not apply to the non-cargo carrying "voyage from Baltimore to Curaçao the owners are liable to the "charterers because, on the findings in the award, all the damage "flowed from the initial unseaworthiness at Baltimore consisting "in an incompetent engine-room staff." As I have held that the "Act" did apply to the voyage from Baltimore I need not elaborate my reasons for thinking that the submission, in my view, failed on the facts as found by the learned umpire.

We were referred to a number of authorities. They lay down familiar principles which I have endeavoured to apply. On the one hand, as Lord Wright said in *Hillas & Co. Ltd.* v. *Arcos Ltd.*,[46] it is the duty of the court to construe commercial contracts broadly, without being too astute or subtle in finding defects. On the other hand, as Lord Wright stated in words which immediately follow, the court is not to make a contract for the parties. There is further the principle stated by Lord Wright in *Petrofina S.A. of Brussels* v. *Compagnia Italiana Trasporto Olii Minerali of Genoa*[47] that exceptions to obligations must be in clear words. These principles, as I have said, are familiar, the difficulty arises in their application. In the present case I think the difficulty arises at the initial stage. Is the effect of the clause to incorporate in this charterparty the provisions as to the carrier's liability which are contained in the Act? This is a question of construction. Once this has been decided the answers to the other questions follow with, I think, reasonable clearness.

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[46] 147 L.T. 503, 514.

[47] 53 T.L.R. 650.

The Court of Appeal took the view that the problems raised were such that the whole clause fell under the principle that the court will disregard contradictory or obscure provisions: *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*[48] It might have advanced clarity if the practice of incorporating an "Act" when the parties meant the provisions of the Rules as applicable to the contract between the parties had been strangled at birth. As it has been recognised in our own courts and in textbooks, the problems that arise in this case do not seem to me to bring the case within the principle laid down in the case cited.

I agree that the questions of law should be answered as proposed by my noble and learned friend on the Woolsack.

I would therefore allow the appeal.

Appeal allowed.

Solicitors: *Constant & Constant; Waltons & Co.*

F. C.

[48] [1908] A.C. 16.

KINGSTON WHARVES LTD. . . . . APPELLANTS;

AND

REYNOLDS JAMAICA MINES LTD. . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA.

Road Traffic — *"Carriage"* — *Meaning* — *Tractor* — *Trailer* — *Wharfage* — *Statutory charges* — *Jamaica* — *"Heavy packages"* — *Wharfage Law,* 1895 (*c.* 231 *Rev. Laws of Jamaica,* 1938; *c.* 412 *of* 1953 *Revision*), *ss.* 12, 16 (9); *Sch. A.*

Jamaica—Shipping—Wharfage—Charge.

Statute — *Construction* — *Meaning of word* — *Contemporary usage* — *"Carriage"*—(*Jamaica*) *Wharfage Law,* 1895, *s.* 12.

The Wharfage Law, 1895, of Jamaica, provides by section 12 for the payment of wharfage according to rates fixed in the Schedules, and Schedule A, as amended, provides: "Carriages, four wheels, "including wheels, each 22s. 6d. Carts and carriages of two wheels, "including wheels, each 9s."

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* *Present*: LORD MORTON OF HENRYTON, LORD COHEN, the RT. HON. L. M. D. DE SILVA.

By section 16 (9): "Any goods not particularly enumerated . . . "in the Schedules . . . shall be liable to be charged for in proportion to the rates therein fixed: Provided, however, that in respect "of machinery and other heavy packages exceeding two tons in "weight the rates shall be fixed by special agreement."

Five tractors—propelled by internal combustion engines—each mounted on four wheels and each weighing 18,000 lbs., and five trailers for use therewith and each mounted on two wheels and each weighing 17,000 lbs., were imported into Jamaica by the respondent company and landed on the appellants' wharves. The respondents contended that the tractors and trailers were "carriages" of four and two wheels respectively, to which the rates in Schedule A applied, and that a total wharfage of £7 17s. 6d. was therefore payable:—

Held, that the tractors and trailers were not "carriages" to which the charges in Schedule A applied, but were goods "not "particularly enumerated . . . in the Schedules" within the meaning of section 16 (9) and, whether "machinery" or not, they fell within the term "heavy packages."

Observations of the Earl of Halsbury L.C. on "carriage" in *Simpson* v. *Teignmouth and Shaldon Bridge Co.* [1903] 1 K.B. 405, at 412 and 413; 19 T.L.R. 225 considered.

Appeal (No. 14 of 1957) from a judgment of the Court of Appeal of Jamaica (January 13, 1956) reversing a judgment of the Resident Magistrate's Court, Kingston (June 24, 1955), and holding that the respondents were entitled to recover £100 in an action brought by them against the appellants for that sum as money had and received by the appellants to the respondents' use.

The following facts are taken from the judgment of the Judicial Committee: The appellants, who were the defendants in the action, were wharfingers. The respondents, who were the plaintiffs, were a bauxite mining company. The respondents imported five Euclid tractors and trailers which were landed on November 28, 1951, on the appellants' wharves at Kingston, in Jamaica. The appellants demanded a sum of £139 6s. 5d. as wharfage payable to them. The respondents contended that only £7 17s. 6d. was payable. The respondents, anxious to prevent delay in delivery, paid the sum demanded under protest and sued in this action for the difference between the two sums. They limited their claim to £100 so as to bring it within the jurisdiction of the Resident Magistrate's Court.

The Resident Magistrate held that the amount demanded by and paid to the appellants was due as wharfage and dismissed the action. On appeal the Court of Appeal (Carberry C.J., Rennie and Cool-Lartigue JJ.) set aside that order and entered judgment for the respondents as prayed for. This appeal was from the judgment and order of the Court of Appeal.

An Euclid tractor was propelled by an internal combustion engine and was mounted on four rubber-tyred wheels. It weighed 18,000 lbs. A trailer weighed 17,000 lbs. and it was mounted on two rubber-tyred wheels. In use it was coupled with a tractor and constructed with a contrivance which enabled a load which it was carrying to be dumped down easily. These articles were imported for transporting bauxite-bearing earth to the respondents' processing plant within the respondents' premises but not for use on a public road.

The Wharfage Law of 1895 (Cap. 281 of the Revised Laws of Jamaica, 1938, Vol. IV, p. 3044; now C. 412 of the 1953 Rev'd. Ed.) made provision for the landing of goods and the payment of wharfage. Section 2 defined "wharfage" as the "payment "authorized by this Law to be demanded and received by any "wharfinger for and in respect of the use of his wharf by any "person and for services rendered thereat in respect of any goods "of such person."

Section 11 provided that every wharfinger should be obliged, to the extent of available accommodation, to receive goods, other than explosives, brought to his wharf.

Section 12 enacted, amongst other things, for the payment of wharfage "according to the rates fixed in one of the Schedules "A, B, C or D to this Law as applicable to the same." In Schedule A appeared the following items—"Carriages, four "wheels, including wheels, each 15s. Carts and carriages of "two wheels, including wheels, each 6s."

By Law 30 of 1951 the charges for these two items at the wharves in question were raised to 22s. 6d. and 9s. The respondents contended that these items were applicable to the goods, that the tractor was a "carriage" attracting wharfage at 22s. 6d. as it was on four wheels, and the trailer was also a "carriage" attracting wharfage at 9s. as it was on two wheels. The appellants denied the correctness of that contention. The Resident Magistrate rejected the contention. The Court of Appeal accepted it.

1958. Nov. 17, 18. *T. G. Roche Q.C.* and *Peter Bristow* for the appellants. On the true construction of Schedule A, as amended, of the Wharfage Law, 1895, neither the tractors nor the trailers are "carriages" and assessable to wharfage as four-wheeled and two-wheeled carriages respectively. The first Wharfage Law of 1784 fixed rates for "coaches," "chariots" and "chaises." That Act was repealed by the Law of 1844, which was followed by that of 1869, and then came the 1895 Law. "Carriage" was put in the last Law, it is submitted, to cover compendiously what had previously been "coach," "chariot" and "chaise." The Court of Appeal in their judgment went straight from the Law of 1784 to that of 1895, whereas the word "cart" came in in the Law of 1844. In 1895 the legislature used the word "carriage" to cover passenger vehicles, but still kept the word "cart." If "carriages" included goods vehicles, why refer to carts; and if "carriages" included carts, there was no reason for putting carts in at all. The various authorities on toll bridges and bicycles each and all turn on the exact words of the Act, and it is not possible to draw attention to any general principle. Only *Simpson* v. *Teignmouth and Shaldon Bridge Co.*[1] may be of assistance, where Lord Halsbury L.C. said that "carriage" in a statute should be interpreted to mean "what would, in the ordinary sense, be considered to be "a carriage (by whatever specific name it might be called) in "the contemplation of the legislature at the time the Act was "passed." These tractors and trailers should not be treated as "carriages" for two reasons: (1) "Carriage," as already indicated, is in 1895 referred to only as being a passenger vehicle —"carts" were included in 1844 to cover every type of goods vehicle. (2) These tractors and trailers would not be in the contemplation of the legislature in 1895 as either carriages or carts. Nobody ever called a traction engine a carriage, and here one is concerned with a tractor, not a motor-car or motor-lorry.

Whether the tractors and trailers are considered separately or have to be considered jointly as six-wheeled vehicles, they are in either case more than two tons in weight and fall within the proviso to section 16 (9) of the Wharfage Law of 1895, which provides: "Any goods not particularly enumerated . . . in the "Schedules . . . shall be liable to be charged for in proportion to "the rates therein fixed: Provided, however, that in respect of "machinery and other heavy packages exceeding two tons in "weight the rates shall be fixed by special agreement." In 1944 the Shipping Association fixed "heavy lift" rates, and thereafter every wharfinger charged that rate, and importers, including the respondents, paid it, and it is submitted that in that way there was an implied contract, which amounted to a "special agreement" within the proviso to section 16 (9), to pay the Shipping Association rate, and the appellants are accordingly entitled to £139 6s. 5d. as wharfage. The trailers come under section 16 (9) as "machinery." It is common ground that tractor and trailer are each over two tons. If they are not "machinery" they are both "heavy packages." According to the evidence they are commonly called "ore hauling machinery." The tractor is clearly not a carriage either of goods or passengers; the trailer is an integral part of the machinery.

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[1] [1903] 1 K.B. 405, 413; 19 T.L.R. 225.

The second question arises on the respondents' submission that the tractors and trailers being "adapted for use on roads" were motor vehicles within the Road Traffic Law (c. 310 of the Rev. Laws of Jamaica, 1938), and are therefore deemed by section 2 (2) of that Law to be carriages within the Wharfage Law. It is conceded by the respondents that these tractors were not intended for use on roads but only within their premises. Whatever construction is adopted, there is no evidence that they have ever been altered by anyone to be made fit for the road. In any event, this point is not now open to the respondents: *The Tasmania*[2]; that was accepted in *Karunaratne* v. *Ferdinandus*[3] and is exactly applicable here, for the point is not referred to in the plaint or in the opening of counsel or in any way in any of the evidence; the Road Traffic Law itself was not even mentioned to the Resident Magistrate, and he does not refer to it in his judgment. The matter arose for the first time in the Court of Appeal in relation to an answer by the appellants to a point taken against them.

The third question, assuming that it is right that these vehicles are not "carriages," is, do the appellants get the Shipping Association rate or a reasonable rate? If these vehicles were heavy weights, then they would pay "heavy lift" rates; if that be wrong, then they would pay at reasonable rates. A wharfinger is a bailee of goods; his rate of remuneration would depend on contract, express or implied. There is an implied contract, when there is no notorious rate which the wharfinger would charge and all one has is evidence that the customer has asked the wharfinger to render the service, to do so at a reasonable rate. If the "heavy lift" rates of the Shipping Association do not amount to a "special agreement" within the proviso to section 16 (9), nevertheless the vehicles fall within the proviso, and in the absence of a special agreement a reasonable rate is payable, and £139 6s. 5d., being the "heavy lift" rate fixed by the Shipping Association and known to and applied to all users of the wharves since 1944, is a reasonable rate.

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[2] (1890) 15 App.Cas. 223, 238.

[3] [1902] A.C. 405, 409.

Stanley Rees Q.C. and *Arthur Bagnall* for the respondents. The tractors and trailers were "carriages" for the purposes of section 16 (1) and Schedule A of the Wharfage Law. The Court of Appeal did not overlook the legislation intervening between 1784 and 1895; they had the subsequent amendments brought to their notice, and they quoted "coach," "chariot" and "chaise," which are in the Acts of 1844 and 1869. The dictionary meaning of "carriage" is a generic word meaning a vehicle of any kind. The two categories set out in the Schedule are divided according to the number of wheels. The true distinction here is undoubtedly wheels; a "cart" must be a two-wheeled vehicle, and "carriage" bears its ordinary generic meaning of vehicle in its widest sense. It is a proper inference from the evidence that the tractors and trailers were landed on the appellants' wharves as separate units, and accordingly they fell to be assessed for wharfage as four-wheeled carriages and two-wheeled carriages respectively under Schedule A. In regard to the Law of 1895 two points are to be borne in mind: (1) This Wharfage Law is a monopoly to the wharfinger (section 3); and (2) it is an offence for a wharfinger to make a charge greater than that permitted by the Law. The Law itself is intended to be comprehensive and to provide for all charges to be made for wharfage; it is intended to provide the way for ascertaining the rates in every circumstance and to cover all types of goods of every sort.

It is conceded that the point that the vehicles were adapted for use on the roads was never taken at any stage below, but it is submitted that there is enough material to enable an inference to be drawn that these vehicles were quite plainly adapted for such use.

Next, assuming that the Board are of opinion that these vehicles were not carriages, the first question is whether they were "machinery" or "other heavy packages" within the proviso to section 16 (9) of the Law. That is to be construed as "machinery or other heavy packages of like kind," and the items are not machinery within the meaning of that Law at all—they are essentially different. "Machinery" refers to packaged machinery and not wheeled machinery. Further, "special" in the proviso to section 16 (9) must be given some meaning. Any public rates of a comprehensive kind could not be "special" within the meaning of the proviso. Any form of implied agreement is very difficult to establish, and it is for the appellants to satisfy the court that there was an agreement. The rates enacted by this Law are fixed by statute, and "special agreement" means an agreement which is special to the consignment, and means rates fixed between the parties. There was here no express agreement to pay the Shipping Association rates, and the conduct of the parties makes it unlikely that there was any implied agreement on the respondents' part to pay those rates on this consignment. The appellants have failed to discharge the onus of establishing a special agreement; there was no evidence that they would treat this consignment differently from that of five months earlier when the "carriages" rates had been paid. The whole of the evidence on this topic tended to show that if there was any special agreement it was that the respondents should pay "carriage" rates. The appellants wholly failed to establish a special or any sort of agreement to pay Shipping Association rates.

Assuming that the tractors and trailers are "machinery" or "other heavy packages," and that there was no special agreement, the respondents throughout this litigation have always been anxious to argue that they are only liable to pay a reasonable rate. Another view is that these vehicles fall within "any goods "not particularly enumerated" in the Schedules, and, therefore, by section 16 (9), have to be rated proportionately, and "any "goods" would include machinery or other heavy packages in respect of which no agreement has been specially fixed.

[*Roche Q.C.*, intervening. The appellants would prefer a decision on what "in proportion" means; it would be of assistance in other cases.]

It would be a mistake on the evidence to treat the Shipping Association rate as being a reasonable rate. There would be nothing surprising to find that these vehicles were coming in at the same rate as other motor vehicles which were intended to be adapted for use on the roads. If they are not carriages, they should be paid for at reasonable rates, and this Board should fix them.

Roche Q.C. in reply. "Special agreement" in the proviso to section 16 (9) can only mean an agreement between the parties. There is here a special agreement to apply the Shipping Association rates. If the vehicles come within the proviso and no special rate has been fixed, one is thrown back onto the first category and the rate has to be fixed in proportion. "In proportion" means that you take that rate which is most nearly applicable and apply it to the case in question as nearly as may be. There is nothing in the Act which excludes the operation of the common law principles in relation to a reasonable rate. If the appellants' argument is not acceptable, it is agreed that the case should be sent back for a reasonable rate to be fixed.

December 15. The judgment of their Lordships was delivered by the RT. HON. L. M. D. DE SILVA, who stated the facts set out above and continued: The appellants arrived at the figure of £139 6s. 5d. on the basis of a scheme of charges drawn up in 1944 by an association known as the Shipping Association. No evidence was given as to the constitution and membership of this association other than that it comprises most of the shipping agents and wharfingers in Jamaica and that some of the directors of the appellant company are members. Under the scheme everything weighing one ton and upwards was classed under an item termed "heavy lift." The association is not a body to which the legislature has delegated the power to fix wharfage charges. The scale of charges fixed by the Shipping Association for "heavy lift" was—"1 ton up to under 2 tons, 9d. per 100 "lbs. plus 50 per cent. 2 tons and under 3 tons, 9d. per 100 lbs. "plus 75 per cent. 3 tons and upwards, 9d. per 100 lbs. plus "100 per cent."

The appellants in the argument before their Lordships sought to sustain the validity of the charges demanded and received by them on the ground that the goods were not covered by any of the items in the Schedules to the Law of 1895 and consequently came within the provisions of subsection (9) of section 16 which says: "Any goods not particularly enumerated and set forth in the "Schedules A, B, C and D annexed to this Law shall be liable "to be charged for in proportion to the rates therein fixed: Pro"vided, however, that in respect of machinery and other heavy "packages exceeding two tons in weight the rates shall be fixed "by special agreement."

They argued further that the goods were "machinery" or "heavy packages" "exceeding two tons in weight" and that there had been a "special agreement" with regard to them. It was said that the Shipping Association scale of charges was open and notorious to all persons importing goods, that they constituted an offer to importers of goods and that if goods were landed on a wharf without a contract relating expressly to the goods the offer of the wharfingers must be deemed to have been accepted by the importer, and that in this way a " special agreement " within the meaning of the subsection would be constituted.

At the end of the argument the parties desired, as a matter of agreement, that if their Lordships came to the conclusion that the articles were " goods not particularly enumerated and set " forth in the Schedules " and that they were " machinery " or " heavy packages " within the meaning of subsection (9) of section 16 but that there had been no " special agreement " within the meaning of the subsection the appellants should be declared entitled to a fair and reasonable charge for the use of the appellants' wharf and for the services rendered by the appellants in respect of the tractors and trailers landed.

For reasons which follow, their Lordships have formed the view that the tractors and trailers in question do not fall for payment of wharfage charges under the item relating to " carriages " in Schedule A, and that they are goods " not " particularly enumerated and set forth in the Schedules A, B, " C and D " within the meaning of subsection (9) of section 16. They agree with the Court of Appeal that there has been no " special agreement " within the meaning of the subsection.

A " carriage " in its widest sense can be said to be something used for carrying persons, goods or something else. Their Lordships do not think the word " carriage " in the Law should be given this wide meaning having regard to the provisions of the Law and the schedules thereto, regarded as a whole. But even if this word is given this wide meaning their Lordships are of the view that a tractor cannot be said to be a carriage. The only thing it carries is the driver, but the purpose for which a tractor is used is not the purpose of carrying a driver. Their Lordships do not think that that which carries a driver for the purpose of driving it can for that sole reason be said to be a carriage.

In *Simpson* v. *Teignmouth and Shaldon Bridge Co.*[1] the Earl of Halsbury L.C. made an observation very relevant to the present case. He said that the word " carriage " in a statute should be interpreted to mean " what would, in an ordinary sense, " be considered to be a carriage (by whatever specific name it " might be called) in the contemplation of the legislature at the " time the Act was passed." Their Lordships find it difficult to imagine that, in however wide a sense the word " carriage "

[1] [1903] 1 K.B. 405, 413; 19 T.L.R. 225.

was used in the Law of 1895, the legislature could have intended articles of the weight and complexity of the tractors and trailers under consideration to be covered by the term. In this connexion another observation of Lord Halsbury in the same case has to be borne in mind. He was considering the word in a taxing statute and he said[2]: "it is not immaterial to observe what the "taxation was." In the Wharfage Law wharfage corresponds to tax and it is not immaterial to consider how the matter stands in respect of wharfage. The item, it will be seen, makes no reference to weight. It is difficult to imagine that the legislature could have contemplated the same amount being paid for a horse-drawn carriage and for a tractor weighing 18,000 lb.

The Court of Appeal, after quoting a passage from the judgment in the *Teignmouth* case[2] said: "It is true that there has "been a considerable development in that type of carriage since "the 1895 Law was passed, but if what is in the ordinary sense "known as a carriage at the time the legislature passed the Law "is still substantially within that definition by whatever name it "may now be called, we think that for the purposes of the "Wharfage Law it comes within the word carriage."

Their Lordships are unable to accept this reasoning. It appears to suggest that a tractor (and a trailer) would have been "in the ordinary sense known as a carriage at the time the legis- "lature passed the Law" if it had then been in existence. Their Lordships cannot accept this view. A suggestion that "wheels "made all the difference" was made in the course of the argument and is illustrated in a passage from the evidence of a witness who said: "Plaintiff firm contends that they are carriages. If a "mechanical crane has four wheels I would regard it as a "carriage. If it had no wheels I would regard it as machinery "falling under heavy lifts. A caterpillar tractor would be heavy "lifts. The wheels make the difference in my opinion." Their Lordships are unable to agree.

It was argued that there would be nothing extraordinary in regarding tractors and trailers as carriages because motor vehicles sometimes weighing up to 4,000 lbs. were rated as carriages. This happens as a consequence of section 2 (2) of the Road Traffic Law (Chapter 310) which enacts: "Every motor vehicle shall be "deemed for any purpose to be a carriage within the meaning of "any Law of this Island and of any Rules, Regulations or Bye- "laws made under any Law of this Island, and if used as a

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[2] [1903] 1 K.B. 405, 412.

" carriage of any particular class shall be deemed to be a carriage " of that class, and the Law relating to carriages of that class " shall apply accordingly." It would appear that for special considerations special provision was made for motor vehicles. The section just quoted gives some force to the argument that but for the statutory provision a motor vehicle would not be a " carriage."

It was sought for the first time on this appeal to argue that tractors and trailers were motor vehicles within the meaning of the Road Traffic Law. A motor vehicle is defined thus in the Law: " 'motor vehicle' means any mechanically propelled " vehicle intended or adapted for use on roads." It must be presumed that the question whether the tractors and trailers were " motor vehicles " within the meaning of the statute had been considered by the respondents and their advisers for the purposes of the proceedings in Jamaica. It was not raised in the courts there, possibly for good reason. It cannot be entertained on this appeal as it involves questions of fact in addition to questions of law.

The conclusions of the Court of Appeal were founded partly on an examination of the history of the legislation which had to be applied. The relevant law is to be found as Chapter 281 in the Revised Edition of the Laws of Jamaica which came into force on August 1, 1938. This edition of 1938 came into being as the result of provision for revision made in the Revised Edition (Laws of Jamaica) Law appearing as Chapter 2 in the Revised Edition. Section 7 provided that the powers of revision conferred on the revising commissioner " shall not be taken to imply any " power in him to make any alteration or amendment in the " matter or substance of any Act or Law or part thereof." Consequently the Court of Appeal considered the law applicable as one that had been passed in 1895.

In the two items " Carriages, four wheels, including wheels " and " Carts and carriages of two wheels " the word " carts " appears in 1895 in the series of Laws dealing with wharfage. Upon a line of argument, which their Lordships do not think it necessary to repeat, the Court of Appeal came to the conclusion that the " intention of the legislature was that carriages " included carts " and that the word " carriages " was used as a generic term. As against this, an argument of great force arises—namely, that if the word " carriages " included carts there was no need to use the word " carts " at all and that its use in 1895 would be unintelligible except upon the basis that the

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word "carriage" was not used as a generic term including carts. On a consideration of this and other instances their Lordships, though conscious that the history of legislation can often throw a great deal of light, are of opinion that it does not in the present case afford inferences sufficiently clear and unequivocal as to what was in the mind of the legislature when it adopted the language which has now to be applied.

It is not contended, and it does not appear, that the articles in question are covered by any other item in the Schedules, and their Lordships are therefore of opinion that the articles are "goods not particularly enumerated and set forth in the "Schedules." Their Lordships find it unnecessary to decide whether or not the goods are "machinery" because they undoubtedly fall within the term "heavy packages."

There was no express agreement as to what wharfage should be paid for these articles. In one previous instance the respondents had been charged wharfage by the appellants for similar articles under the item relating to carriages. The appellants say that that charge had been made in error by one of their officers. The respondents had paid the "heavy lift" rates in the Shipping Association's rates on other goods, but not on goods of the same description as those now under consideration. A tacit agreement to pay the Shipping Association charges for these articles is not lightly to be inferred in these circumstances. The evidence is not strong enough to support the suggestion that the Shipping Association charges constituted an offer which the respondents must be deemed to have known and tacitly accepted. When the question of payment arose between the parties, the respondents at the very outset asserted that another basis of payment was the correct one. They had in fact been earlier charged on that basis. Their Lordships do not think that a "special agreement" within the meaning of subsection (9) of section 16 can be said to have been made.

As a consequence of the conclusions arrived at by their Lordships, and of the agreement between the parties, the appellants are entitled to reasonable remuneration for the use of their wharves and for the services rendered by them in respect of the tractors and trailers landed. The case should be sent back to the Resident Magistrate for this remuneration to be assessed on such material as may be put forward by the parties.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the decree of the Court of Appeal be set aside and the case sent back to the Resident Magistrate's

Court for that court to assess what is a fair and reasonable charge for the use of the appellants' wharves and for the services rendered by the appellants in respect of the tractors and trailers landed on their wharves, and that judgment be entered on the basis that the sum so assessed was due to the appellants. The respondents must pay to the appellants two-thirds of their costs of this appeal and in the Court of Appeal. The Resident Magistrate, after determination of the sum payable to the appellants, will make such order as he thinks right as to costs in respect of the original trial and in respect of the further inquiry now directed.

Solicitors: *Clifford-Turner & Co.; A. F. and R. W. Tweedie.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*
1958
March 3, 4;
April 24.

LONDON INVESTMENT AND MORTGAGE CO. LTD. . . . . . . APPELLANT;
AND
WORTHINGTON (INSPECTOR OF TAXES) . RESPONDENT.
[TWO APPEALS.]

SAME . . . . APPELLANT;
AND
INLAND REVENUE COMMISSIONERS . RESPONDENTS.
[TWO APPEALS.]

Revenue—Income tax—War damage—Value payments—Property dealing company—Whether profits or gains for income tax purposes—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I—War Damage Act*, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *ss.* 36, 66, 79, 80—*War Damage* (*Public Utility Undertakings, etc.*) *Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 36), *s.* 28 (1) (4).
War Damage.

A company which carried on the trade of property dealing received value payments under the provisions of the War Damage

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD SOMERVELL OF HARROW.

Act, 1943,[1] in respect of some of its properties which had been damaged and destroyed by enemy action:—

Held (Lord Reid dubitante), that the payments should be treated as trading receipts in computing the profits or gains of the company for the purposes of assessments to income tax and profits tax.

It was not a matter of necessary implication in section 28 of the War Damage (Public Utility Undertakings, etc.) Act, 1949, that, since expenditure on making good war damage was not allowable as a deduction for tax purposes so far as it was covered by a war

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[1] War Damage Act, 1943, s. 36 (1): "The contributions to be made "towards the expense of making pay- "ments under this Part of this Act "in respect of war damage shall, "subject to the provisions of this Part "of this Act, be made in respect of "the properties, being units for the "purposes of Schedule A or for rating "valuations, which are specified in "section 39 of this Act; and a "property in respect of which such "a contribution is to be made is in "this Act referred to as a 'contri- "'butory property.' (2) The said "contributions shall be made by the "payment of five instalments, falling "due on the first day of July in the "year 1941 and each of the four "following years. (3) The amount "of an instalment shall, subject to "the provisions of this Part of this "Act, be computed as mentioned in "sections forty to forty-three of this "Act by reference to the assessment "of the contributory property for the "purposes of Schedule A or the "annual value of the property shown "in a valuation list in force for "rating purposes; and the value by "reference to which an instalment is "computed is in this Act referred to "as the 'contributory value' of the "property."

S. 66 (1): "Contributions made "and indemnities given under this "Part of this Act shall be treated for "all purposes as outgoings of a "capital nature . . ."

S. 79 (1): "Payments by the "Commission in respect of war "damage, and payments of interest "on value payments and on pay- "ments to be made under section 18 "of this Act, shall be made out of "moneys provided by Parliament."

S. 113: [This section was amended and substantially re-enacted by s. 28 of the War Damage (Public Utility Undertakings, etc.) Act, 1949:— see below.]

War Damage (Public Utility Undertakings, etc.) Act, 1949, s. 28: "(1) In computing the amount of the "profits or gains, or of the income "from any source, of any person for "any purpose of the Income Tax "Acts, or the amount of the profits "of any person for the purposes of "the profits tax or for the purposes "of excess profits tax, no sum shall "be deducted in respect of any pay- "ment or expenditure to which this "section applies . . . (4) Expendi- "ture to which this section applies "is—(*a*) any expenditure on repairing "or otherwise making good war "damage to land in so far as any "person has received or is entitled to "a payment in respect of the damage "by virtue of any of the provisions "of the principal Act (whether alone "or as applied or modified by or "under any provision of this Act), "and any expenditure on making "good detriment to an interest in "goods caused by war damage in so "far as any person has received or "is entitled to a payment in respect "of the detriment by virtue of any of "those provisions or of a policy issued "under either of the schemes operated "under Part II of the principal Act "or by virtue of section ten of this "Act; and (*b*) any expenditure on "repairing or otherwise making good "war damage being damage of a "class mentioned in any of para- "graphs (*a*) to (*d*) of subsection (1) "of section one of this Act, or on "measures for meeting the circum- "stances created by any such obstruc- "tion as is mentioned in section "eighteen of this Act."

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damage payment, such payments must in no circumstances be treated as trading receipts for tax purposes.

Per Lord Reid. Section 28 cannot (*semble*) be applied literally to traders in land in that it must be so interpreted as to authorise the trader to omit from his tax account a cost of works payment.

J. Gliksten & Son Ltd. v. *Green* [1929] A.C. 381; 45 T.L.R. 274 and *Newcastle Breweries Ltd.* v. *Inland Revenue Commissioners* (1927) 96 L.J.K.B. 735; 43 T.L.R. 476 considered.

Decision of the Court of Appeal [1957] 1 W.L.R. 116; [1957] 1 All E.R. 277 affirmed.

CONSOLIDATED APPEALS from the Court of Appeal (Lord Evershed M.R., Birkett and Romer L.JJ.).

The two first appeals related to assessments to income tax made on the appellant company, London Investment and Mortgage Co. Ltd., and were respectively appeals by the appellant company from orders of the Court of Appeal dated December 6, 1956, allowing appeals by the respondent, F. N. Worthington (H.M. Inspector of Taxes), from orders of the High Court (Upjohn J.) dated May 10, 1956. By his orders an appeal of the appellant company on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts from the determination of those commissioners was allowed and a cross-appeal by the respondent was dismissed. The two last appeals related to assessments to profits tax made on the appellant company, and the proceedings in relation thereto, mutatis mutandis, were of the same nature and effect as those in relation to the first two appeals.

The facts, stated by Viscount Simonds, were as follows: This appeal related to assessments to income tax made upon the appellant company for the years 1948–49 and 1949–50 and to profits tax for the chargeable accounting periods April 1, 1947, to March 31, 1948, and April 1, 1948, to March 31, 1949. Upon each of the assessments the same question arose.

The material facts as found by the Commissioners for the Special Purposes of the Income Tax Acts were that the appellant company was at the relevant times a property-dealing company, that during the war certain of its properties suffered war damage and that under the provisions of the War Damage Acts, 1941, 1943 and 1949, it received value payments from the War Damage Commission in respect of a number of these properties. The short question was whether these value payments ought to be treated as trading receipts in computing the profits or gains of the company for the purpose of the assessments in question. The respondents contended that they should, the appellants that they should not.

The commissioners held that such payments ought prima facie to be brought in as receipts of the company's trade, as the properties formed part of its stock-in-trade and "on well-known "principles any sum received as compensation for their loss is "a trading receipt," but they further held, in view of certain provisions of the War Damage Acts, that "where a property has "been, is being, or is intended to be repaired or rebuilt sums "received in respect of it should not be included as receipts, but "should be deducted from the amount expended on rebuilding."

John Senter Q.C. and *Desmond Miller* for the appellant company. The relevant enactments are the War Damage Act, 1941, the War Damage Act, 1943, and the War Damage (Public Utility Undertakings, etc.) Act, 1949. The scheme of the Acts is to inaugurate and, if need be, augment or diminish a national fund to make good war damage to land, including buildings, in the United Kingdom: see the preamble to the Act of 1941 and sections 1 (1), 80 and 103 (1) to (3) of the Act of 1943. The fund is made up in the first place (a) out of moneys provided by Parliament, and (b) out of contributions by persons interested in land: section 1 (1) of the Act of 1943. Power is taken, having regard to estimates made by the Treasury, to increase or reduce contributions, having regard to the "expected net receipts to "the Exchequer" and the expected payments out of the fund: section 80 of the Act of 1943. The contribution is obligatory on every owner of a proprietary interest in land: sections 37, 45 (1) (*a*), 105 and 123 (1) of the Act of 1943. The amount of the contribution is to be computed by reference to the Schedule A or rating valuation: sections 36, 39 (1) and 40 (1) of the Act of 1943.

Land is dealt with, for the purpose of payments out of the fund, in units called "hereditaments": section 5 of the Act of 1943. Such payments are of two kinds: (a) cost of works payments; (b) value payments: section 6 (1) of the Act of 1943. The recipient of a value payment is the owner of the proprietary interest in the hereditament: sections 12 and 123 (1) of the Act of 1943. A value payment falls to be determined by reference to the depreciation of the value of the hereditament: section 6 (1) (*b*) of the Act of 1943. Power is taken to increase the amount of value payments: section 11 of the Act of 1943. All payments into the fund are to be treated for all purposes as capital: section 66 (1) of the Act of 1943.

Section 28 of the Act of 1949, consonantly with the scheme of the Acts, proceeds on the basis that a contributor receives his payments out of the fund in the same capacity as that in which he made his contributions into the fund, namely, as the owner of a proprietary interest in land and on the plane of capital. Since the contribution is to be treated as an outgoing of a capital nature for all purposes, including, presumably, a computation of profits for the purposes of taxation, it must be implied that any payment is similarly to be regarded as of a capital nature for the same purpose. Since under section 28 of the Act of 1949 expenditure on making good war damage is not to be allowed as a deduction so far as it is covered by a war damage payment, it is a necessary implication that in no circumstances can such payments be treated as trading receipts for tax purposes.

The value payments received by the appellant company were not profits arising from its trade. The character of the payments is to be determined at the moment of receipt and at that moment the payments were not profits or gains of the company. They were capital. Their source, like that of the cost of works payments, was the statutory right given to it by the Acts. It received the payments in its capacity of a landowner, not a dealer in land.

In dealing with this legislation it should be emphasised that a charging section must be strictly construed: see paragraph 1 (*a*) (ii) of Schedule D to the Income Tax Act, 1918, and rule 3 of the rules applicable to Cases I and II.

Both cost of works payments and value payments should be treated alike as receipts of a capital nature. The provisions of the Acts are only consistent with the view that the whole Act operates on the plane of capital. The source of this payment was not the company's trading, but the statutory right under the Acts, and the whole scheme of the Acts is not to deal with revenue. The application or destination of the fund is not the test. The short question is: Was this payment, when it was received, a profit or gain of the trade? That is the moment when its character must be determined: *Morley* v. *Tattersall.*[2] The application of a receipt cannot affect its taxability or non-taxability. See also *Forth Conservancy Board* v. *Inland Revenue Commissioners.*[3] Here the operation of the War Damage Acts takes the case out of the charge to tax.

Geoffrey Cross Q.C. and *Alan Orr* for the respondents. The assessments to income tax were made in respect of the company's trade in accordance with Schedule D to the Income Tax Act,

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[2] (1938) 108 L.J.K.B. 11, 15; 54 T.L.R. 923; [1938] 3 All E.R. 296.

[3] [1931] A.C. 540, 547–548, 549; 47 T.L.R. 429.

1918, and the rules applicable to it, and the assessments to profits tax were made in respect of its trade or business in accordance with the provisions of that Act as applied to profits tax by section 20 of the Finance Act, 1937.

The fundamental proposition in the Crown's argument as to the prima facie position is that where a trader is dealing in any kind of commodity and where, for any reason, part of that commodity disappears or is compulsorily taken and is replaced by a sum of cash by way of compensation, then prima facie that sum should be taken into the account of profits or gains arising or accruing to the trader from his trade. The question here is whether anything in the War Damage Acts displaces that prima facie position. There is no express statement to that effect in section 28 of the Act of 1949 or elsewhere. For the appellant company it is said that the payments were received by it in its capacity as landowner. But everything which such a trader gets he receives in his capacity as a landowner because the land is his stock-in-trade.

As to the point of the non-deductibility of the contribution for the purposes of income tax, that is counterbalanced by the fact that the insurer is the State which is entitled to the tax. As to the provision in section 28 of the Act of 1949 forbidding deduction, that is analogous to the provision in rule 3 (K) of the rules applicable to Cases I and II of Schedule D. See also section 101 of the Income Tax Act, 1952, as to allowance under Schedule A for maintenance, repairs, insurance and management.

The argument for the appellant company attaches too much importance to section 68 of the Act of 1943 in suggesting that it makes all receipts capital, even when received by traders: see section 42 of the Act.

If a trader sustains a loss in respect of which he receives a value payment which he can do what he likes with, there is no hardship in bringing it in in computing his profits and gains under rule 3. It was the business of this company to dispose of its stock-in-trade and receive a cash equivalent. It is irrelevant for the purposes of income tax whether there is a sale or an involuntary loss followed by compensation: see *J. Glikstcn & Son Ltd.* v. *Green.*[4] This is so, although in the drafting of these Acts Parliament may have had in mind traders who owned fixed capital assets and not traders whose stock-in-trade was buildings, and section 28 cannot be applied literally to them.

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[4] [1929] A.C. 381, 383; 45 T.L.R. 274.

On receipt of a cost of works payment, in the valuation of the stock-in-trade the valuation of the damaged property must be written up to the value of the repaired property. When a trader in land receives such a payment, section 28 is unnecessary. In practice a cost of works payment is not shown in a trading account and section 28 (4) must be so construed as to authorise that; otherwise the result produced is impossible. Accordingly, a cost of works payment is omitted from the tax account. But it is otherwise with the value payment.

Alan Orr following. The court here is concerned with a value payment and not a cost of works payment. There is a distinction between the two.

The provision here is very like rule 3 (K) of the rules applicable to Cases I and II of Schedule D.

Nothing in *Glikstcn's* case [5] went outside the case of total destruction of the stock-in-trade. That decision shows that the insurance money had to be brought in on the credit side of the profit and loss account. But there is a difference between total destruction and damage. If a bookseller's shop was damaged by fire, no books might be destroyed but some might need rebinding and the insurance money would be set off against the cost of repairs. The Act of 1943 should be approached on the footing of the distinction between destruction and damage. The cost of works payment represents the cost of making good damage: section 6 (1) (*a*) of the Act of 1943. It is only paid when the work is done: section 22 (1).

John Senter Q.C. in reply. Nothing in *Glikstcn's* case [6] makes the use of the insurance moneys for any particular purpose obligatory. The case for the appellant company is not based on anomalies or hardship but essentially on the conclusions to be drawn from the war damage legislation. Section 2 of the Act of 1943 is concerned with war damage quite generally. The value payment need not be used in making good the damage. The test is: Is the payment, *when used*, a profit or gain of the trade. War damage payments were intended for the restoration of buildings. A national fund had been created and the payments in and out were capital.

Their Lordships took time for consideration.

April 24. VISCOUNT SIMONDS, having stated the facts and the findings of the commissioners, continued: My Lords, this determination may well appear to produce an equitable result, but it has not been found possible to support it in any court, and there is in fact no via media. The value payments as a whole are to be treated as trading receipts or as a whole are not. Upjohn J. has held that they are not, the Court of Appeal that they are. I agree with the Court of Appeal.

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[5] [1929] A.C. 381, 383, 384.

[6] [1929] A.C. 381.

My Lords, I have no doubt that the commissioners were right in saying that the payments were prima facie trading receipts. It was the business of the company to dispose of its stock-in-trade and to receive a cash equivalent or other compensation in return, and for the purpose of income tax law such cases as *J. Gliksten & Son Ltd.* v. *Green*[1] and *Newcastle Breweries Ltd.* v. *Inland Revenue Commissioners*[2] show that it is irrelevant whether the disposition is by sale, voluntary or compulsory, or by an involuntary loss attended by subsequent compensation. The company had one asset, lost it, and acquired another. I think it is incontrovertible that the asset it acquired was acquired in the course of its business, and not the less so because the war damage scheme was universal and compulsory and applied equally to all property owners whether or not they carried on the business of dealers in property. I do not deal at greater length with this part of the case because I am in complete agreement with the judgment of the Court of Appeal.

But the strength of the company's case lay in the special provisions of the War Damage Acts and in particular section 66 of the Act of 1943 and section 28 of the Act of 1949.

Section 66 of the 1943 Act provided that contributions made and indemnities given under that part of the Act should be treated for all purposes as outgoings of a capital nature. The contributions here referred to are the contributions which under the Act property owners were required to make towards the expense of making the payments in respect of war damage as therein provided. They might be regarded as analogous to premiums paid upon insurance with the State acting as insurer, but making a contribution of its own towards the necessary payments. The argument was that, since the contribution was for all purposes to be treated as an outgoing of a capital nature, including, no doubt, a computation of profits for tax purposes, it should be implied that any payment must also be regarded as of a capital nature for the same purpose. I should not be disposed to give much weight to this argument in any case, but what weight it has is lost upon a consideration of section 80. That section authorised the Treasury from time to time to make estimates of the net receipts of the Exchequer under that part of the Act, on the one hand, and the expected payments, on the other hand, and to increase or reduce the contributions accordingly. It would therefore appear reasonable that the total net contribution to the Exchequer should not be in effect reduced by allowing the contributor to bring it into account as an income payment for income tax purposes.

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[1] [1929] A.C. 381; 45 T.L.R. 274.

[2] (1927) 96 L.J.K.B. 735; 43 T.L.R. 476.

A more serious argument was founded on section 28 of the Act of 1949, which replaced section 113 of the Act of 1943. Section 28 was made retrospective and is applicable to the present case. It is a section which relates to income tax and profits tax and excess profits tax and nothing else, and I think that I must cite a substantial part of it. It provides that, in computing the amount of the profits or gains or of the income from any source of any person for any purpose of the taxes I have mentioned, no sum shall be deducted in respect of any payment or expenditure therein mentioned. It then provides, by subsection (2), that no sum shall be included in respect of any payment or expenditure to which the section applies in computing (inter alia) " (*b*) the cost to " any person of maintenance, repairs, insurance and management " in respect of which relief may be claimed under or by reference " to Rule 8 of No. V of Schedule A " and by subsection (4) (so far as relevant) that the expenditure to which the section applies is any expenditure on repairing or otherwise making good war damage to land in so far as any person has received or is entitled to a payment in respect of the damage by virtue of any of the provisions of the principal Act (i.e., the Act of 1943). It is to be observed that the section does not purport to deal in any way with the manner in which receipts are to be treated for tax purposes. It is concerned only with deductions. " No sum shall be " deducted " are the governing words. But it is said that it is a matter of necessary implication that, if expenditure on repairing or otherwise making good war damage is not allowable as a deduction so far as it may be covered by a war damage payment, then such payments must in no circumstances be treated as trading receipts for tax purposes.

My Lords, I cannot accede to this argument. I hesitate in any case to introduce by way of implication in a taxing statute a provision which cries aloud for express statement if it is intended. But I am not satisfied of any such intention. No doubt it operates hardly against the taxpayer if, having brought into account a payment as a trading receipt, he is disallowed an equivalent amount of expenditure in repair. But equally it is for him an uncovenanted benefit if he does not bring into account a sum which, had it been the proceeds of sale of his property instead of compensation for its loss, he must have brought into account, and which he may dispose of as he thinks fit, whether in repair or rebuilding or otherwise. It might be possible, I do not say it would, to come to a different conclusion if the property owner, receiving a value payment, was bound to apply it in repair. But he is under no such obligation and I cannot write into the Act words which are not there so as to divest of its normal fiscal consequence the receipt by him of a sum of money which he prima facie receives as a trading receipt. In this case we are concerned with a value payment, not with a cost of works payment. The latter payment is only made after the cost has been incurred and we were told that in practice it was usually made direct to the building contractor. It may be that different considerations apply to it. I do not intend to say anything that would prejudice such a case, but, so far as value payments are concerned, whether deliberately or through inadvertence, the case of the property dealer being overlooked or incompletely regarded, there is, in my opinion, no provision, express or implied, which enables him to exclude them from his computation of profits.

In the course of the argument there was some discussion of rule 3 (K) of the General Rules of Schedule D to the Income Tax Act. It was suggested that it provides a useful analogy to section 28. Perhaps it does. But I am content to abide by what appears to be the plain meaning of the statute.

I would dismiss this appeal with costs.

Lord Morton of Henryton. My Lords, I agree with the speech which has just been delivered by my noble and learned friend on the Woolsack and I have nothing to add.

Lord Reid. My Lords, I regard this as a difficult case. Apart from the provisions of section 28 (4) of the War Damage (Public Utility Undertakings, etc.) Act, 1949, I should have no difficulty. It may be true that a person who does not trade in property, but carries on another trade within property owned by him, may pay or receive money in his capacity of owner and not in his capacity of trader. But when the property, in respect of the ownership of which he receives money, is part of his stock-in-trade, I find it difficult to imagine a case where that money would not be a trading receipt. In this case the money was received because the value of the stock-in-trade had been diminished by enemy action, and it must certainly be treated as a trading receipt unless the statute requires it to be treated in some other way.

Section 28 (4) applies to all payments made in respect of war damage to land. Its provisions are intelligible and just in all cases where the owner was not trading in land and did not hold the land as part of his stock-in-trade, but they are so ill-designed and lead to such unjust and anomalous results if one tries to apply them literally where the land was stock-in-trade of a trader that it was admitted and seems clear that the draftsman did not have in mind the case of a trader who deals in land.

As I recently ventured to point out in *Income Tax Special Commissioners* v. *Linsleys* (*Established 1894*) *Ltd.*[3]: "We are "therefore confronted with the not unusual problem of applying "statutory provisions to circumstances which they were not "designed to meet. In such a case it appears to me to be neces-"sary to make a rather wide survey, because one can easily reach "a wrong conclusion if attention is concentrated only on those "provisions which are immediately applicable to the particular "case."

I therefore think it necessary to examine the operation of section 28 (4) not only in relation to value payments but also in relation to cost of works payments. This matter was not fully developed in argument and I state my views with some hesitation. But a decision of this House as to the meaning and effect of a statute is none the less final though some relevant argument was not developed in the case, and I therefore feel bound to state my views as briefly as I can.

Under the War Damage Act, 1943, a payment made in respect of war damage may be either a cost of works payment or a value payment, the latter being made where war damage involves total loss. But total loss does not mean that the property is incapable of repair or reinstatement: it means broadly that the cost of reinstatement would be more than the amount by which the value of the property as a site and in its damaged state would be increased if reinstatement was carried out. And the Act goes on to provide that in certain cases value payments shall be made although the general rule would require a cost of works payment, and vice versa. Both kinds of payment are normally payable to the owner; but a cost of works payment can only be made when the sum involved has already been expended on the property, whereas a person receiving a value payment is free to do as he likes with it—he may, but need not, spend it on repairing the property. I should add that 1939 values are used in these calculations, but there is provision for increasing value payments so calculated by 45 per cent. It appears to me that, if a value payment received by an owner who is a trader in land is a trading receipt, then a fortiori a cost of works payment received by such owner must be a trading receipt. But I need not elaborate that because I understood that that was not disputed by counsel for the respondent.

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[3] [1958] A.C. 569, 585; [1958] 2 W.L.R. 292; [1958] 1 All E.R. 343.

Section 28 of the 1949 Act, which replaced an earlier provision in the 1943 Act, is designed to deal with the income tax position of owners who receive war damage payments. It applies alike to value payments and cost of works payments, and it provides that in computing income no sum shall be deducted in respect of any payment or expenditure to which the section applies, and that in computing cost of repairs, etc., no such sum shall be included in any claim for relief. The expenditure to which the section applies includes (subsection (4) (*a*)): "any expenditure on "repairing or otherwise making good war damage to land in "so far as any person has received or is entitled to a payment "in respect of the damage by virtue of any of the provisions of "the principal Act (whether alone or as applied or modified by or "under any provision of this Act). . . ."

Where damage is suffered by land which is not part of a trader's stock-in-trade, the diminution in value of the land does not enter into his account of profits for income tax purposes, and, when he receives a value payment or cost of works payment, that payment also does not enter into that account. But without section 28 (4) he might as a result of spending the payment on repairs be able to diminish his income tax liability. That would plainly be wrong and section 28 (4) prevents it.

But the position is very different if the land is part of the trader's stock-in-trade. The value of the stock-in-trade (at cost or market price, whichever is the lower) at the beginning and also at the end of the year must enter the income tax account. Apart from section 28 (4) the position, as I see it, would be that, if land is damaged and its value after damage is less than the value at which it stood in the valuation of stock-in-trade at the beginning of the year, only its damaged value can be included in the valuation of stock-in-trade at the end of the year. That will either diminish the profits for the year or produce a loss which it may be possible to carry forward. Then later, when the cost of works payment or value payment is received, it is a trading receipt and must enter the account as such, and the cost of works payment, being spent on repairing the property, or any part of the value payment so spent, will enter the account as an expense. And, finally, the valuation of the damaged property in the valuation of stock-in-trade will have to be written up to the value of the repaired property. I did not understand counsel for the respondent to deny that.

Where a trader in land receives a cost of works payment there appears to be no need for section 28, and it would introduce confusion and injustice if it were applied literally. The 1943 Act contemplates that he, like other owners of war-damaged land, will carry out and pay for the reinstatement, and will then receive the cost of works payment. Apart from section 28 the trader in land would in his tax account enter the cost of reinstatement as an outgoing and enter the cost of works payment as a receipt. That would produce a just result. But section 28 prevents him from showing as an outgoing the cost which he has incurred and paid, but contains no express authority for excluding the cost of works payment from the other side of his account. And, being a trading receipt, it must be included unless there is authority to exclude it. If it is not excluded, then a fictitious profit will result. I understood counsel for the respondent to admit that this is an impossible result, that in practice the payment is always omitted and that section 28 must be so interpreted as to authorise this omission. He pointed out that in many cases the owner does not in fact receive the payment because the payment is often made directly to the contractor who has carried out the reinstatement. In such a case neither the cost of reinstatement nor the cost of works payment would appear in the trader's account because he did not in fact pay the one or receive the other, and section 28 would have no application. But section 28 does apply to cases where in fact the trader pays for the reinstatement and receives the cost of works payment, and it could not be right that its application should increase the trader's tax liability merely by reason of the fact that the cost of works payment was paid to the trader and passed on by him to the contractor instead of being paid directly to the contractor.

So this question arises. It being admitted, and I think rightly admitted, that section 28 cannot be applied literally to traders in land, and that it must be so interpreted as to authorise the trader to omit from his tax account one kind of war damage payment, a cost of works payment, ought the section to be interpreted so as to authorise a similar omission of the other kind of war damage payment, a value payment? There is no hard and fast line between the two. Both are payments in respect of war damage and both appear to me to be trading receipts when received by a trader in land. The only relevant difference is that, whereas a cost of works payment must be spent on reinstatement, a value payment may but need not be so spent. If the value payment is so spent then the reason for interpreting section 28 so as to exclude it is just as strong as in the case of a cost of works payment. But it is said that if the trader chooses not to spend his value payment on the property he will make an untaxed gain if it is omitted from his trading account. For the moment that might be so. But if later on he spends money on making good the damage, or if he sells the property in its damaged state and the purchaser spends money for that purpose, section 28 still applies to prevent credit being taken for such expenditure in so far as it does not exceed the amount of the value payment.

For these reasons I find great difficulty in reading into section 28 an implied provision with regard to cost of works payments but refusing to read in a similar provision with regard to value payments. But, in the peculiar circumstances of this case, I do not find it necessary to dissent from the conclusion at which your Lordships have arrived.

LORD TUCKER. My Lords, for the reasons which have been stated by my noble and learned friend on the Woolsack, I agree that this appeal should be dismissed.

LORD SOMERVELL OF HARROW. My Lords, for the reasons which have been stated by my noble and learned friend on the Woolsack, I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *R. C. Bartlett & Co.; Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

LONDON TRANSPORT EXECUTIVE . . APPELLANTS;

AND

BETTS (VALUATION OFFICER) . . . RESPONDENT.

H. L. (E.)*

1958
April 16, 17, 24;
June 25.

Rates and Rating—Industrial hereditament—Road vehicle housing or maintenance—Public transport depot—Hereditament used for overhaul and repair of omnibuses—Whether used for "maintenance" of road vehicles—Whether a "place within . . . close, curtilage or "precincts of factory" but "deemed not to form part of the "factory" — "Maintenance" — "Overhaul" — "Reconstruction"—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3.

Judicial Precedent—House of Lords decision—How far binding—Point not adequately considered—Interpretation of statute—Conflict of particular precedent with fundamental principle.

A hereditament owned and occupied by the appellants was used as a depot for the periodic overhaul of omnibuses and for repair in the case of major accidents suffered by them. With insignificant exceptions the whole of the hereditament was used for dismantling and reconditioning used parts as distinct from manufacturing new ones. The process of overhaul involved detaching the body of the vehicle from its chassis, which was sent for overhaul elsewhere, and about 25 per cent. of the identifiable parts underwent some treatment or were replaced. After the process was completed the body would not usually be reunited to the original chassis. The hereditament was included in Part I of the valuation list but the appellants contended that it ought to be treated as an industrial hereditament and transferred to Part II of the list, not being excluded from the definition of "industrial hereditament" in section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, by subsection (2) [1]:—

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* *Present*: LORD MORTON OF HENRYTON, LORD REID, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD DENNING.

[1] Rating and Valuation (Apportionment) Act, 1928, s. 3: "(1) In "this Act the expression 'industrial "'hereditament' means a hereditament . . . occupied and used . . . "subject as hereinafter provided as a "factory or workshop: Provided that "the expression industrial hereditament does not include a hereditament occupied and used as a factory "or workshop if it is primarily occupied and used for the following "purposes or for any combination of "such purposes, that is to say . . .— "(f) any other purposes, whether or "not similar to any of the foregoing, "which are not those of a factory or "workshop."

Subs. (2), as amended by s. 69 of the Local Government Act, 1929, which added subparagraph (*a*): "For "the purposes of this Act . . . (*b*) "any place used by the occupier for "the housing or maintenance of his "road vehicles . . . shall, notwithstanding that it is situate within "the close, curtilage or precincts "forming a factory or workshop and "used in connexion therewith, be "deemed not to form part of the

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Held (Lord Denning dissenting), that the hereditament was not an industrial hereditament within the definition in section 3 of the Act. "Maintenance" within the meaning of section 3 (2) (*b*) included repairing, overhauling and reconditioning of vehicles so long as the work did not amount to reconstruction—the making of a new article—and no manufacture of new parts was carried out on a scale to which the de minimis rule could not be applied. The line between "maintenance" and "reconstruction" was one of fact and degree. "Maintenance" and "overhaul" were not mutually exclusive. The work carried out at the depot was "maintenance" within the meaning of section 3 (2) (*b*) of the Act, as amended. Further, the depot was excluded from the benefit of section 3 by subsection (2), although the whole of the hereditament, and not merely a definable part situated within the precincts of what would have been otherwise a factory within the definition, was used for the maintenance of road vehicles.

Potteries Electric Traction Co. Ltd. v. *Bailey* [1931] A.C. 151; 47 T.L.R. 154; *Scottish Motor Traction Co. Ltd.* v. *Edinburgh Assessor*, 1931 S.C. 416 and *Hall & Co. Ltd.* v. *South-East Area of Surrey Assessment Committee* (1933) 4 D.R.A. 29 applied.

Per Lord Reid. It has long been established practice that any decision of this House in a previous case on a question of law, such as the interpretation of a statute, shall be regarded as binding, and shall be followed, whether or not the question was adequately argued or considered, and however much your Lordships may disagree with the decision. I would not myself be against a modification of this strict practice, but so long as it exists I do not think that I am entitled to depart from it.

Per Lord Denning. It seems to me that when a particular precedent—even of your Lordships' House—comes into conflict with a fundamental principle, also of your Lordships' House, then the fundamental principle must prevail. This must at least be true when, on the one hand, the particular precedent leads to absurdity or injustice and, on the other hand, the fundamental principle leads to consistency and fairness. . . . Here every principle of construction requires this House to limit the word "maintenance" to ordinary maintenance and not to extend it to the vast repairs and reconditioning and reassembling done in this depot.

Decision of the Court of Appeal [1957] 1 W.L.R. 988; [1957] 3 All E.R. 126 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Morris and Pearce L.JJ.).

This was an appeal from an order of the Court of Appeal dated July 11, 1957, whereby an appeal by the appellants, the London Transport Executive, on a case stated by the Lands Tribunal (Erskine Simes Q.C.), pursuant to section 3 (4) and (11) of the

"factory, but save as aforesaid, the "expression 'factory' or 'workshop' "have the same meaning as in the "Factory and Workshop Acts, 1901 "to 1920."

Lands Tribunal Act, 1949, and R.S.C., Ord. 58A, was dismissed and the decision of the Lands Tribunal was affirmed. By its decision the Lands Tribunal had dismissed an appeal by the appellants from a decision of the Central Middlesex Local Valuation Court. The question to be determined was whether the hereditament, the subject of the appeal, the Aldenham Depot at Elstree, was on March 29, 1954, and/or on January 3, 1955, being the dates on which the respondent, Henry Fennell Betts (valuation officer) and the appellants respectively made the proposals to alter the valuation list which initiated these proceedings, an industrial hereditament within the meaning of section 3 of the Rating and Valuation (Apportionment) Act, 1928.

The findings of fact in the case stated were as follows: "The "depot is registered as a factory under the Factory and Workshop "Acts.

"It was used at the material time for the periodical overhaul "of the omnibuses used by the appellants and for the repair of "major accidents suffered by such vehicles.

"The work of overhaul is divided between the depot and the "Chiswick works of the appellants. At the date of the proposal, "March 29, 1954, the overhaul work at the depot consisted of the "overhaul of the body only, the chassis being merely prepared "for dispatch to the Chiswick works for overhaul there, although "heavy repairs to the chassis frame were carried out at the depot.

"The overhaul of the appellants' vehicles is done to a pro-"gramme, each vehicle being completely overhauled every 3½ "years, maintenance and repair work (other than in cases of "major accidents) in the intervening period being carried out at "the local garages of the appellants.

"On arrival at the depot a vehicle is inspected and all parts "requiring attention are marked with chalk and entered on a "schedule. It is then taken to the body dismount shop where "the body is removed from the chassis by an overhead crane. "The chassis was then taken to the chassis preparation shop "where it was cleaned and made ready for despatch to the "Chiswick works for overhaul there. After overhaul it was "returned to the depot, but it was improbable that, on its return, "its former body would be replaced on it, since the chassis went "into stock and would in due course be drawn out and fixed to the "body next in turn for despatch. The body is taken to a piece of "machinery called an inverter which enables it to be turned on "its side for washing and for the carrying out of certain under-"floor and roof repairs.

" From the inverter the body is taken by crane to the body " repair shops. Here it is mounted on stilts which form a jig " and hold the body at a convenient height for working between " fixed gantries which afford convenient access at different levels. " All defective parts are removed and subsequently go to appro- " priate shops elsewhere for reconditioning (if possible). The " parts so removed are replaced by new or reconditioned parts " taken by the men engaged on the job from stocks stored in " what are known as cafeteria racks running along the side of the " shop. The extent of the replacements carried out are, on the " average, 1,940 pieces out of a total of 7,500 which constitute " the total body; of these 1,940 pieces some 1,740 are recondi- " tioned and subsequently re-used. These numbers exclude nuts, " bolts and screws.

" The body having been reintegrated, is then taken by over- " head crane to another inverter, where a coating of protective " paint is applied to the underside.

" From there it is carried to the mount shop where it is " again mounted on a chassis, which has been overhauled at " Chiswick and returned to the depot.

" It is then towed to the rectification shop, where it is " inspected. It then goes out on a road test and returns to " the rectification shop for the correction of any faults shown " on the road test.

" From there it is towed to the preparation shop where it " is prepared for painting and where certain minor painting, " such as the cream line, is put in by hand. Here, in addition " to rubbing down, masks or protective coverings are applied to " those parts not to be painted the familiar red or green.

" In certain cases where the paint work is very bad, such " as cases where small dents have been beaten out in situ, the " vehicle may have previously been taken through the special " preparation shop where the existing paint is chemically removed.

" After preparation the vehicle goes to the paint shop where " it is painted with one coat of colour by electrical sprays hand " operated. It is there air dried and the transfers are put on " during this drying period. It then receives two coats of varnish " and is oven dried after each coat.

" The vehicle then goes to the finishing shop where the re- " conditioned cushions and upholstery are fitted and any small " touchings up and finishings are carried out.

" Finally the vehicle goes to the licensing garage where it is " inspected by the transport executive rolling stock engineer and "the licensing authorities before it goes back to its own garage. "For the purposes of the taxation officers, the bonnet number, "the maker's chassis number and the registration number have "to agree, and in view of the separation of body and chassis "in the early stages of the overhaul and the substitution of a "different reconditioned chassis at a later stage, body and chassis "are renumbered so as to correspond with the licence.

"The whole process of overhaul of a vehicle from the time "it enters to the time it leaves the depot occupies about three "weeks.

"So far as major accident repairs are concerned, of which "during the year ended March, 1954, there were an average of "between ten and twenty vehicles a week, the vehicle is first "inspected and the necessary body repair work carried out in "the accident repair shops and any necessary repainting consequent upon such repairs done in the accident painting shop. "Damage to the chassis would also be repaired in the depot "in the development shops.

"Even if a vehicle incurred a major accident within a short "period before it was due for overhaul, it would go first to the "accident repair shop for the accident damage to be repaired "before it underwent overhaul though in such cases the repainting would be omitted in view of the complete repainting "which each overhauled vehicle receives.

"All defective parts whether removed from a body in the "body repair shops or the accident repair shops are first examined to see if they are capable of reconditioning. If they are "so fit they are collected in the pre-repair stores where they "are made up into batches and sent to the appropriate shops "in the depot where they are reconditioned. After reconditioning, metal parts are stove enamelled and timber parts hand "painted. They are again inspected and then go to the progress "body repair stores which together with the main stores, which "are used primarily for new material, form the reservoir from "which the cafeteria racks are kept stocked.

"There are two of the reconditioning shops of which special "mention may be made, the trimmers' shop and the board and "blinds shop. In the former the cushions and upholstery are "cleaned, repaired and rebuilt, and the leathercloth used for "lining the omnibus and linoleum and cork tiles are cut to the "necessary size from new material. In certain cases it proves "necessary for new moquette to be used as the outer cover "for the cushions and squabs (or backs of the seats), and this "also is cut out and fitted in this shop. The extent of the "reconditioning of the cushions and squabs varies from cleaning "and a repaint of the back of the squab to a complete stripping "to pieces and reassembling as in the original manufacture.

"In the boards and blinds shop, destination blinds are re-"painted or reconditioned. During 1954 500 new blinds were "made and 370 reconditioned on an average each week.

"There was also at the depot a plant shop used for the "maintenance and servicing of the plant used on the premises "and the manufacture of certain plant and equipment for such "use.

"In 1955 there had been removed to the depot the recon-"ditioning of chassis which had formerly been carried out at "Chiswick. The defective parts were sent to Chiswick for "reconditioning and after reconditioning returned to the depot.

"Chassis reconditioned at the depot have defective parts "replaced from the store to which the reconditioned parts are "returned."

Sir Andrew Clark Q.C., *Michael Rowe Q.C.* and *David Widdicombe* for the appellants. In the court below "mainten-"ance" was given far too wide a meaning, its popular meaning. What was done on these premises was not maintenance but repair. Cleaning, washing, running repairs, minor adjustments, oiling and greasing are maintenance.

The questions to be answered are: (1) Was the tribunal right in holding that the operations carried on at the depot constituted "maintenance" within section 3 (2) (*b*) of the Act of 1928? (If it was not "maintenance" within the subsection, the appeal must succeed and the other questions do not arise.) (2) Assuming, however, that the operations in question constituted "mainten-"ance," did section 3 (2) (*b*) operate to prevent the depot from being an industrial hereditament within the Act of 1928? (3) If, on its true construction, section 3 (2) (*b*) favoured the appellants' contentions on the second point, did section 3 (1) (*f*) prevent the depot from being an industrial hereditament?

The following are the appellants' general submissions: (1) The premises were at all material times used for periodical overhaul of the appellants' buses and for repair of major accidents. They were therefore properly registered under the Factory and Workshop Acts as a factory, since they were a factory within section 149 (1) (*c*) of the Act of 1901. This necessarily follows from the findings of fact.

(2) The work carried out on the whole of the hereditament was substantially of the same nature all over; it was homogeneous and constituted user for factory purposes within the meaning of the Act, and section 3 (1) (*f*) can have no application.

(3) On the true construction of section 3 (2) (*b*) of the Act, the word "maintenance" in that subsection cannot include repairing work of such a character as would constitute the premises on which it is carried on a "factory" within the Factory and Workshop Acts, but must be confined to such operations as washing, cleaning, oiling, greasing and day-to-day running adjustments. Section 151 (1) (vi) of the Factories Act, 1937, draws the distinction. The operations there set out plus greasing and oiling are covered by "maintenance" in section 3 (2) (*b*) of the Act of 1928.

(4) If maintenance does not include repair, it follows from the primary findings of fact that the appellants' depot is not used for maintenance within section 3 (2) (*b*) and is an industrial hereditament.

(5) The finding of the Lands Tribunal that the depot was used for maintenance was based on the assumption that "maintenance" as used in section 3 (2) (*b*) bore no special meaning and was to be construed in the widest possible sense to include anything which might in ordinary parlance be termed maintenance. This was a wrong construction of the Act and therefore an error in law. Therefore this finding of the tribunal cannot be treated as a finding of fact which ought not to be disturbed.

(6) Alternatively, if what was done was "maintenance," section 3 (2) (*b*) must be strictly construed, especially bearing in mind that it is a taxing provision (because it takes certain hereditaments out of the area of relief). When strictly construed, it applies only to cases where one finds an admitted factory within the curtilage of which some part is used for housing and/or maintenance of the owner's road vehicles. It does not apply to the case where the only activity carried on at the factory is the maintenance and housing of vehicles and where it is that very maintenance which alone constitutes the factory in the first instance. Section 3 (2) (*b*), therefore, has no application to the present case, which falls to be determined on a consideration of the question whether the depot is or is not a factory within the Factory and Workshop Acts.

There is no direct authority binding on this House. *Potteries Electric Traction Co. Ltd.* v. *Bailey* [2] is a case where the relevant

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[2] [1931] A.C. 151, 156–158, 162–164, 165, 169, 171; 47 T.L.R. 154.

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section was considered, but the House did not reach any decision as to the meaning of "maintenance." The House so far dissented from the view of Scrutton L.J. in the Court of Appeal [3] that repair is an essential part of maintenance that it must be taken as overruled: *per* Lord Warrington.[4] Here the depot is not used for the purpose of painting buses, but for their overhaul and reconditioning. The user of the premises here is one and indivisible. They are used for the purpose of taking in a battered and damaged bus and of turning out what is virtually a new bus. There is nothing in the case referred to which binds the House to dismiss the appeal. "Maintenance" is not the same thing as "overhaul": *Hall & Co. Ltd.* v. *South-East Area of Surrey Assessment Committee.*[5] See also *Northern Motors* v. *York Rating Authority* [6] and *London Passenger Transport Board* v. *Railway Assessment Authority.*[7]

There is a distinction between the primary facts found here and the conclusion drawn from them. Here on the basis of the primary facts the decision should have been for the appellants: see *British Launderers' Research Association* v. *Hendon Rating Authority* [8] and *B.P. Refinery (Kent) Ltd.* v. *Walker,*[9] which the appellants rely on.

In section 149 (1) (*c*) of the Factory and Workshop Act, 1901, there is a definition of a "non-textile factory." Within that definition there might be factory premises of which 90 per cent. were subject to non-industrial user. Not the whole of a factory is used for industrial premises (there are also offices), but the whole is under the umbrella of the factory, because a factory is used partly for industrial purposes and partly for non-industrial purposes. To come within section 149 (4) something must be found which is not incidental to the work in the main factory. As regards section 3 (2) (*b*) of the Rating Act of 1928 (as amended by the Local Government Act, 1929), this depot is a factory within the terms of the Act, since there is nothing to take it out of the category of an industrial hereditament, and section 3 (2) (*b*), which refers back to the Act of 1901, is only dealing with cases where something which is not a factory has got in under the factory umbrella. Section 4 does not apply at all until there is an industrial hereditament.

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[3] [1931] 1 K.B. 385, 498; 46 T.L.R. 601.

[4] [1931] A.C. 151, 174.

[5] (1933) 4 D.R.A. 29.

[6] (1934) 20 R. & I.T. 6.

[7] (1941) 13 D.R.A. 64, 79.

[8] [1949] 1 K.B. 462, 471; 65 T.L.R. 103; [1949] 1 All E.R. 21.

[9] [1957] 2 Q.B. 305, 327; [1957] 2 W.L.R. 907; [1957] 1 All E.R. 700.

The concept of running repairs must be limited to matters which did not make the place a factory within the Factories Acts. "Maintenance" in section 3 (2) (*b*) must be contrasted with overhaul. On that point the tribunal was wrong in law. On the primary facts found in the case stated, what was done went far beyond ordinary "maintenance."

Section 3 (2) (*b*) can only apply to parts, and not to the whole, of a hereditament, and (if it be held that this depot was used for "maintenance") the whole, and not a part of it, was so used. Further, even in the case of premises used for "maintenance" which are within the curtilage of a factory, section 3 (2) (*b*) directs that part to be cut out of the factory; it does not direct that it shall not be derated. That part must be reconsidered as a separate entity and, if it is itself a factory, it is entitled to derating. That principle must equally apply if section 3 (2) (*b*) is held to apply to this case.

Maurice Lyell Q.C. and *Patrick Browne* for the respondent. The respondent submits: (1) "Maintenance" and "repair" are not mutually exclusive terms, as the appellants contend. The former includes all work necessary to maintain the vehicles as a fleet in running condition. It is accepted that reconstruction goes beyond overhaul, but the distinction between repair and overhaul is not the border line: see *London Passenger Transport Board* v. *Railway Assessment Authority*,[10] *Scottish Motor Traction Co. Ltd.* v. *Edinburgh Assessor*[11] and *Potteries Electric Traction Co. Ltd.* v. *Bailey*.[12] The obiter dicta of two of the Lords in the last-mentioned case relied on by the appellants are not inconsistent with the view that these decisions give the right directions for considering whether there is "maintenance" here or more than "maintenance." Applying the test there laid down, there was ample evidence on which the Lands Tribunal could come to the conclusion that this work did not go beyond "maintenance."

(2) As to the meaning of section 3 (2) (*b*) of the Act of 1928: (a) Its effect must be not confined to parts of a hereditament which have a factory on them over and above the parts used for the housing and maintenance of road vehicles, but it applies equally where the whole hereditament is used for the housing and maintenance of road vehicles. (b) If a part of a larger whole is used for the housing and maintenance of road vehicles, it is

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[10] 13 D.R.A. 64.

[11] 1931 S.C. 416.

[12] [1931] A.C. 151.

not part of the factory and becomes non-industrial for derating purposes once and for all; nothing that is not a factory can have an industrial purpose. (c) Not only does it come out of the factory for all purposes, but it does not, when it is out, have to be treated as a separate hereditament: see rule 4 and the form in Schedule I, Part II, of the Valuation List Rules, 1955, made under the Rating Acts of 1925 and 1928 for the operation of those Acts.

As to the meaning of "maintenance" in section 3 (2) (*b*), it has been argued for the appellants that maintenance and repair are mutually exclusive. But that is contrary to the decision in the *Potteries* case.[13] The observation of Scrutton L.J.[14] was not overruled, and what was said by three of the Lords may be set against the doubtful observation of Lord Warrington [15] relied on by the appellants: see also *Scottish Motor Traction Co. Ltd.* v. *Edinburgh Assessor*,[16] which decided that repair included a very wide field of rebuilding not amounting to renewal. *Dalziel Co-operative Society* v. *Motherwell Assessor* [17] is not of assistance in the present case. *Hall & Co. Ltd.* v. *South-East Area of Surrey Assessment Committee* [18] and *London Passenger Transport Board* v. *Railway Assessment Authority* [19] are relied on.

In section 5 (2) of the Act of 1928 "construction, maintenance "and repair" are linked. This does not mean that maintenance and repair are mutually exclusive, since, out of caution, lawyers often use overlapping words so as to be sure that nothing is omitted. Thus in the same subsection there is a reference to "all purposes connected with the conveyance or transport," although the two are nearly identical. So, too, "maintenance" and "repair" are to be treated as dealing with separate matters.

The proviso to section 3 (1) of the Act of 1928 should be read back into the Act of 1901. In the definition of "non-textile "factory" in section 149 (1) of that Act no limitation is to be put on the natural meaning of the words used, "altering, repair-"ing, ornamenting" and "adapting for sale": see *Fullers Ltd.* v. *Squire*.[20] That is so, even though the words deal with quite trivial matters which one would not have thought constituted the place a factory. So, too, the meaning of the word "mainten-"ance" in section 3 (2) (*b*) of the Act of 1928 is unqualified.

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[13] [1931] A.C. 151, 163, 164, 169, 182.

[14] [1931] 1 K.B. 385, 498.

[15] [1931] A.C. 151, 174.

[16] 1931 S.C. 416, 417, 421 et seq.

[17] 1932 S.C. 413.

[18] 4 D.R.A. 29.

[19] 13 D.R.A. 64.

[20] [1901] 2 K.B. 209.

The buses go into the depot in a strict rota and are not battered or damaged. There are 7,500 parts to a body and, on the average, 1,940 require attention in one form or another. (This does not include screws and bolts.) Only 200 new parts are put in. That does not go beyond repair and become reconstruction. To change a bus from petrol to diesel would be reconstruction, or to change it from a four-wheel to a six-wheel vehicle, or to use the parts to build a new vehicle ("canibalising"). We are not concerned with the identity of any vehicle but with keeping a fleet of buses on the road; 10 go in and 10 come out. The vehicles are commercially identical and are so treated by the licensing authorities. What was said by Lord Evershed M.R. at the end of his judgment in the Court of Appeal [21] is sound.

As to the appellants' argument that section 3 (2) (*b*) does not apply to a case where the only activity carried on at the factory is the maintenance and housing of vehicles, the answer is well expressed by Lord Evershed M.R. in the Court of Appeal.[22] In that paragraph "notwithstanding" means "even if" or "even though." That parenthesis does not affect the construction of the rest.

A comparison in the use of the expression "manufacturing process" is to be found in section 122 of the Coal Mines Act, 1911.

Sir Andrew Clark Q.C. in reply. There are two ways of approach to the present case. The first, which is the proper one, is that of Lord Sands in *Dalziel Co-operative Society* v. *Motherwell Assessor* [23] that the whole premises fall to be treated as a unum quid. The other is the respondent's approach.

In the construction of section 3 (2) (*b*) of the Act of 1928 the omission of the parenthesis beginning "notwithstanding" does not help the respondent. The sub-paragraph refers to "the factory."

Repairing is in contradistinction to maintenance and the two are mutually exclusive.

As to what constitutes an industrial hereditament, see *Toogood & Sons Ltd.* v. *Green* [24] and *Turpin* v. *Middlesbrough Assessment Committee*.[25] Premises must be judged on their own merits to see whether or not they are used for maintenance.

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[21] [1957] 1 W.L.R. 988, 1001; [1957] 3 All E.R. 126.

[22] [1957] 1 W.L.R. 988, 996–997.

[23] 1932 S.C. 413, 418–419.

[24] [1932] A.C. 663, 674; 48 T.L.R. 463.

[25] [1931] A.C. 446, 470; 47 T.L.R. 408.

The *Potteries* case [26] is not a decision of the House of Lords on any point material here: see the arguments of counsel [27] and the observations of Lord Buckmaster.[28] The dicta relied on by the respondent are not valuable here because they were not directed to the present point.

Scottish Motor Transport Co. Ltd. v. *Edinburgh Assessor* [29] was wrongly decided and, in any event, is not binding on the House. It is inconsistent with *Hall & Co. Ltd.* v. *South-East Area of Surrey Assessment Committee*,[30] which was rightly decided.

There is a distinction between maintenance and overhaul. It is not contended that there was reconstruction here, but there was reconditioning and that is more than maintenance. Putting right the breaking of a back axle or the tearing off of a mudguard could not be within a contract for the maintenance of a car; that would be repair work

Their Lordships took time for consideration.

June 25. LORD MORTON OF HENRYTON. My Lords, the question arising on this appeal is whether a hereditament occupied by the appellants and known as "the Aldenham depot" is an "industrial hereditament" as defined by the Rating and Valuation (Apportionment) Act, 1928, which I shall call "the 1928 "Act," and is accordingly entitled to the benefit of the "derating" provided by section 68 of the Local Government Act, 1929. The Central Middlesex Local Valuation Court, the Lands Tribunal (Mr. Erskine Simes, Q.C.), and the Court of Appeal have all answered this question in the negative.

The definition of an industrial hereditament is to be found in section 3 of the 1928 Act, the relevant provisions whereof (as amended by section 69 of the Local Government Act, 1929) are as follows: "(1) In this Act the expression 'industrial heredita-"'ment' means a hereditament (not being a freight-transport "hereditament) occupied and used . . . subject as hereinafter "provided, as a factory or workshop: Provided that the expression "industrial hereditament does not include a hereditament occupied "and used as a factory or workshop if it is primarily occupied and "used for the following purposes or for any combination of such "purposes, that is to say—(*a*) the purposes of a dwelling-house;

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[26] [1931] A.C. 151.
[27] Ibid. 155, 156.
[28] Ibid. 164.
[29] 1931 S.C. 416.
[30] 4 D.R.A. 29.

"(*b*) the purposes of a retail shop; (*c*) the purposes of distributive wholesale business; (*d*) purposes of storage; (*e*) the purposes of a public supply undertaking; (*f*) any other purposes, "whether or not similar to any of the foregoing, which are not "those of a factory or workshop. (2) For the purposes of this "Act— . . . (*b*) any place used by the occupier for the housing or "maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts "forming a factory or workshop and used in connexion therewith, be deemed not to form part of the factory or workshop, "but save as aforesaid, the expressions 'factory' and 'workshop' "have respectively the same meanings as in the Factory and "Workshop Acts, 1901 to 1920."

By section 149 (1) of the Factory and Workshop Act, 1901, the expression "factory" has the following meaning assigned to it, so far as material to this appeal: "Subject to the provisions "of this section, the following expressions have in this Act the "meanings hereby assigned to them; that is to say:— . . . The "expression 'non-textile factory' means— . . . (*c*) any premises "wherein or within the close or curtilage or precincts of which "any manual labour is exercised by way of trade or for purposes "of gain in or incidental to any of the following purposes, "namely—(i) the making of any article or part of any article; "or (ii) the altering, repairing, ornamenting or finishing of any "article; or (iii) the adapting for sale of any article, and wherein "or within the close or curtilage or precincts of which steam, "water or other mechanical power is used in aid of the manufacturing process carried on there. The expression 'factory' "means textile factory and non-textile factory or either of those "descriptions of factories."

The Lands Tribunal Act, 1949, provides, by section 3 (4): "A "decision of the Lands Tribunal shall be final: Provided that any "person aggrieved by the decision as being erroneous in point of "law may . . . require the Tribunal to state and sign a case for "the decision of the court."

My Lords, it is not in dispute that the Aldenham depot is a "factory" within the definition contained in section 149 (1) of the Factory and Workshop Act, 1901, but the tribunal in the present case found that the activities carried on by the appellants at the depot were the maintenance of their road vehicles within the meaning of section 3 (2) (*b*) of the 1928 Act and that therefore the depot was not an "industrial hereditament" within the definition in section 3 (1) of the same Act. The question stated by the tribunal for the decision of the court was "whether upon "the findings of fact he came to a correct decision in law," and that question can conveniently be divided into two parts: (1) Did the tribunal fall into any error of law in holding that the activities carried on by the appellants at the depot were the maintenance of their road vehicles? (2) If the tribunal fell into no such error in so holding, were the tribunal and the Court of Appeal right in holding that on the true construction of section 3 of the 1928 Act the depot is not "an industrial hereditament"?

Before considering the first question it is necessary to set out the facts upon which the decision of the tribunal was given. I find it impossible adequately to summarize the very clear findings of fact, and I think it is necessary to quote them at length, in order to give an accurate picture of the appellants' activities. [His Lordship read the findings of fact and continued:]

It will be observed, my Lords, that in the boards and blinds shop and in the plant shop a certain amount of manufacture is carried on, but it was common ground between the parties that this manufacture was on such a small scale, compared with the other work carried on at the depot, that it should be disregarded by the application of the rule de minimis non curat lex. Thus your Lordships can approach the first of the two questions already stated upon the footing that either the whole of the depot is used for the maintenance of the appellants' road vehicles, or no part thereof is so used.

Sir Andrew Clark, for the appellants, submitted that the word "maintenance" should be given a narrow meaning in section 3 (2) (*b*) of the 1928 Act, and referred your Lordships to section 151 (1) (vi) of the Factories Act, 1937. He did not, of course, submit that this section could be used for the purpose of construing the 1928 Act, but he did submit that the operations of "cleaning, washing, running repairs or minor adjust- "ments" set out in sub-clause (vi) of that section, with the addition of "oiling and greasing," were the operations covered by the word "maintenance" in section 3 (2) (*b*) of the 1928 Act.

My Lords, I cannot find any context which supports this argument, either in the 1928 Act as a whole or in section 3 thereof. Moreover, I can find no support for the argument in any of the cases to which reference was made at the hearing. The word "maintenance" is an English word in ordinary use, having no technical meaning and its meaning in section 3 (2) (*b*) of the 1928 Act was considered by this House in *Potteries*

Electric Traction Co. Ltd. v. *Bailey*[1] and by the Lands Valuation Appeal Court in *Scottish Motor Traction Co. Ltd.* v. *Edinburgh Assessor.*[2]

In the former case this House decided that work done on the hereditament then in question (except as to one part thereof used as a paint shop) went beyond user for the maintenance of the vehicles of the Potteries company. It is, however, clear from the speeches of Lord Buckmaster and other noble and learned Lords that the decision was based on the fact that spare parts were manufactured on a large scale upon the premises. Lord Buckmaster said[3]: "It is said that these "hereditaments are used for maintenance of road vehicles, and "accordingly that they are disentitled to the benefit of the "statute. I find myself unable to accept this view having "regard to the findings in the special case. The fact that "spare parts are necessary for repairing omnibuses does not, "in my opinion, make the manufacture of the spare parts a "maintenance of the omnibus within the meaning of the statute. "The processes carried out are distinctly held in the special "case to be processes that are additional to ordinary maintenance. I think the word maintenance is a word sufficiently "well known in this connection to entitle us to rely upon the "special finding of the fact in the case. The finding that the "work done in the manufacture of all the various articles "specified, every one of which, as found in the case, would "have to be purchased by the appellants, if not made upon "their own premises, shows that in substance the work carried "on is the work of the manufacture of a large number of "articles incident to the construction and the maintenance of "a fleet of omnibuses. But the construction of an article needed "to maintain differs, in my opinion, from what is meant by "the word maintenance. . . . There is, however, one part "of the building that is specially used for a purpose that "obviously may be that of maintenance. It is that part which "is devoted to the painting of omnibuses. It was urged by "the appellants that there was nothing to show how much of "this painting was done by way of repair and how much is "original work, but in the workshops of an omnibus company "owning a fleet of 198 omnibuses there must be constant re-"painting required, and I think it is safe to assume that this "part of the hereditament is devoted to that object and not

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[1] [1931] A.C. 151; 47 T.L.R. 154.

[2] 1931 S.C. 416.

[3] [1931] A.C. 151, 163–164.

"entitled to the benefit of relief." The last passage makes it clear that Lord Buckmaster regarded the word "maintenance," as used in section 3 (2) (*b*) of the 1928 Act, as including work of repair.

In the *Scottish Motor Traction* case[4] the Lands Valuation Appeal Court (Lords Hunter, Sands and Fleming) upheld the decision of the Valuation Committee that the use of certain premises for "repairing, overhauling, and conditioning the "chassis and bodies of the appellants' buses" (to quote Lord Hunter[5]) was a use for the maintenance of the appellants' road vehicles within the meaning of section 3 (2) (*b*). The appeal court delayed giving judgment until the *Potteries* case[6] had been decided and reported, and Lord Sands observed[7]: "The premises are used for three purposes: (1) somewhat "extensive offices; (2) the repair of cars sent for that purpose "by outside customers; (3) 'repairing, overhauling, and recon-"'ditioning' the appellants' vehicles. The first is plainly a "non-industrial purpose. The second is covered by the pro-"vision excluding retail shops from the benefit of the Act. "The third is struck at by section 3 (2) of the 1928 Act as "being 'maintenance' of the company's road vehicles, unless, "and so far as the repairing, overhauling and reconditioning "involve such an amount of renewal as not to be fairly des-"cribed as maintenance of a vehicle." And the same learned judge observed, in regard to other premises[8]: "There is nothing "to show that the overhauling and reconditioning goes beyond "maintenance." The relevant facts in the *Scottish Motor Traction* case,[9] which has stood for 27 years, strongly resemble the facts in the present case. I note that counsel for the respondent argued successfully[10]: "It was immaterial that "the work was carried out on a very large scale. The im-"portant point was that it was repair work, and not manu-"facture." I entirely agree with that observation. In my view the word "maintenance," in section 3 (2) (*b*) of the 1928 Act, covers repairing, overhauling and reconditioning of vehicles, so long as the work does not amount to reconstruction, and so long as no manufacture of new parts is carried out on a scale to which the de minimis rule cannot be applied. If this view is correct, it may often be difficult to draw the line between

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[4] 1931 S.C. 416.
[5] Ibid. 421.
[6] [1931] A.C. 151.
[7] 1931 S.C. 416, 425.
[8] Ibid. 426.
[9] 1931 S.C. 416.
[10] Ibid. 420.

"maintenance" and "reconstruction." That is a matter of fact and degree, upon which different minds may arrive at different conclusions: see *per* Lord Fleming in the *Scottish Motor Traction* case.[11]

In the course of argument reference was made to the decisions in *Hall & Co. Ltd.* v. *South-East Area of Surrey Assessment Committee*[12] and *London Passenger Transport Board* v. *Railway Assessment Authority*[13] (the *Charlton Works* case). I see no reason to doubt the correctness of each of these decisions upon the particular facts of the respective cases, but I cannot accept the passage in the judgment of Charles J. in the former case, where he contrasts "maintenance" with "overhaul." In my view the words "maintenance" and "overhaul" are not mutually exclusive.

In the present case the view of the tribunal was expressed as follows: "As in all questions of degree, it is not easy to "say on which side of the line a certain process may be said "to fall, but after a careful consideration of the evidence in "the light of the view which I had of the depot on September "19, I have arrived at the decision that the processes carried "out at the depot can properly be described as the maintenance "of vehicles. It is, I think, material that at the material "dates no manufacture of new parts other than destination "blinds was taking place at the depot. The work done at "the depot was work necessary to maintain the vehicles as "a fleet in running condition, and the fact that, in order to "carry out the work more expeditiously and efficiently, recon-"ditioned parts were substituted in place of reconditioning and "replacing the defective parts actually removed cannot in my "view change what is in fact a repair into a reconstruction. "Nor I think can the fact that, instead of dealing with each "dented plate or mudguard as the damage occurs, such repairs "are carried out to a programme, alter the essential character "of the work. Looking at each of the individual processes "they seem to me to fall clearly within what, if one was "dealing with a single vehicle, might properly be called main-"tenance, and I do not think that because they are done "collectively to a fleet of vehicles they can be said to lose "this character."

I cannot find any error of law in the decision of the tribunal upon this point, and, reading the decision as a whole, I cannot

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[11] 1931 S.C. 416, 430.
[12] (1933) 4 D.R.A. 29.
[13] (1941) 13 D.R.A. 64.

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find that the tribunal misconstrued the word "maintenance" as it is used in section 3 (2) (*b*) of the 1928 Act. I agree with the conclusion of the Court of Appeal, as expressed by the Master of the Rolls [14]: ". . . taking the matter as a whole, "viewing it broadly and in the light of the whole evidence, "it seems to me impossible to say that the conclusion which "the tribunal reached was not a reasonable conclusion justified "by the language of the section."

For these reasons, my Lords, I would uphold the decision of the tribunal that the work carried out by the appellants at the depot was maintenance of their road vehicles. What, then, is the effect of section 3 (2) (*b*) of the 1928 Act upon the position of the appellants? As I have already said, it is common ground that no distinction can be drawn between the work carried out upon different parts of this hereditament, and that the whole of the hereditament is a "factory" within the definition in section 149 of the Factory and Workshop Act, 1901. It is clear that if only part of the hereditament had been used for the maintenance of the appellants' road vehicles, that part would "be deemed not to form part of the factory or work"shop" and would thus be excluded from the benefit of derating, even if the part so used were as much as nine-tenths of the whole. It is, however, contended by Sir Andrew Clark that section 3 (2) (*b*) has no application to the present case, as not a part but the whole of the "factory or workshop" is used for the maintenance of the appellants' road vehicles; thus the whole of the hereditament is entitled to be derated. Such a result may fairly be described as absurd, and I think that the words of section 3 (2) (*b*) can properly be applied to a case in which the "place" used for either of the purposes mentioned in the subsection is the whole of the hereditament. I agree with the view expressed as follows by the Master of the Rolls, with the concurrence of Morris and Pearce L.JJ.[15]: ". . . according to the plain sense of the language, the para"graph is, I think, saying: 'any place'—and I emphasise "the word '*any* place'—'used for the maintenance of road "'vehicles notwithstanding that it is'—and I paraphrase that, "'even though it be'—'within the close, the confines, of a "'factory, still, it is not to be deemed part of the factory; "'and if it so happens that the place is the whole, then none "'of it forms part of the factory and the whole is excluded.'

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[14] [1957] 1 W.L.R. 988, 1002; [1957] 3 All E.R. 126.

[15] [1957] 1 W.L.R. 988, 997.

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"I do not say the language is wholly happy, but I cannot find "such a construction as I have given to be subversive of the "meaning of the words used. I think that such a reading "of the paragraph gives common sense and coherence to the "two subsections read together."

The result is, in my opinion, that the depot is not an industrial hereditament within the definition in section 3 (1) of the 1928 Act, and this appeal should be dismissed with costs.

LORD REID. My Lords, the appellants can only succeed if their Aldenham depot is an industrial hereditament within the meaning of section 3 of the 1928 Act. There is no question of apportionment in this case: either the whole hereditament is industrial or none of it is. To be an industrial hereditament it must be occupied and used as a factory. Undoubtedly, it is a factory within the meaning of the Factory and Workshop Act, 1901, but section 3 of the 1928 Act adopts the definition of factory in the 1901 Act subject to limitations. I do not think that we are concerned with the limitations contained in the provisos to section 3 (1): proviso (*f*) is not very easy to interpret but it does not appear to me to have any application to this case. But the limitation contained in section 3 (2) (*b*) is of crucial importance. The subsection is in these terms: [His Lordship read the subsection and continued:]

The question in this case is whether the provisions of this subsection prevent the appellants' premises from being an industrial hereditament and therefore exclude derating. The first argument is that the subsection cannot apply because the work carried on in these premises is not "maintenance" of the appellants' vehicles. It is said that maintenance in this context does not include repairs but only includes such minor operations as oiling, greasing, inflating tyres, and perhaps making adjustments and cleaning. The structure and wording of section 3 are such that at first sight at least this argument is attractive.

The definition of "factory" in the 1901 Act is such that, if what I may call factory work is done in only part of a hereditament, or of a "close or curtilage or precincts," it brings within the factory not only those areas where factory work is done but also other areas within the precincts where no factory work is done. Looking to the purposes of the Factories Acts this is intelligible, but looking to the purposes of the derating legislation it is equally intelligible that areas where no factory work is done should not be derated merely because they are within the same precincts as the actual factory. What I have called factory work includes "(ii) the altering, repairing, ornamenting or finishing of "any article," and these terms cannot be read in any narrow sense.

If "maintenance" could be read as limited to minor operations which do not amount to altering, repairing or ornamenting vehicles, then subsection (2) (*b*) would be dealing only with places where no factory work is done, and would simply provide that such places, though technically within a factory by reason of the 1901 definition, are not to be part of a factory for the purposes of the 1928 Act. But I cannot accept that argument because, in my judgment, it is not consistent with the decision of this House in *Potteries Electric Traction Co. Ltd.* v. *Bailey*.[16] It has long been established practice that any decision of this House in a previous case on a question of law, such as the interpretation of a statute, shall be regarded as binding, and shall be followed, whether or not the question was adequately argued or considered, and however much your Lordships may disagree with the decision. I would not myself be against a modification of this strict practice, but so long as it exists I do not think that I am entitled to depart from it.

I have had the advantage of reading the speech about to be delivered by my noble and learned friend, Lord Keith of Avonholm. I agree with his analysis of that case and shall not add to it. But I think that that case leaves open the question whether maintenance in this context is wide enough to cover all kinds of repair, however extensive, or whether it should be limited to some particular kinds of repair. This question appears to me to depend on the proper construction of the word "maintenance" in the context of this subsection, and that must be a pure question of law. Once it is decided that maintenance includes at least some kinds of repair I can see no good reason for holding that any particular kind of repair is excluded. It is not suggested that maintenance in this context has any technical meaning. "Maintenance" is an ordinary word of the English language, and, if it includes doing a few repairs at one time and then a few more at another time, I do not see how the operation could cease to be maintenance if it is found convenient to do a large number of repairs at the same time. Nor do I see any proper distinction between different kinds of repairs, or between repairs which are

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[16] [1931] A.C. 151.

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done with simple equipment and repairs which are more conveniently done in a fully equipped workshop. But reconstruction which goes beyond producing a repaired vehicle, and in effect produces a different vehicle, may be another matter. I do not think, however, that it would be reasonable to hold that the operations in the present case go beyond repair and amount to reconstruction. It is true that, as the bodies of the vehicles dealt with are interchangeable, it is generally found convenient not to replace the same body on the same chassis. That is the only feature in the case which could, to my mind, be said to point to reconstruction, but it would not appear to me to be reasonable to attach crucial importance to this point. I am therefore of opinion that the facts found in this case have rightly been held to come within the scope of maintenance.

But that does not end the case. Two arguments were submitted to the effect that, even if these premises were wholly used for maintenance, they should nevertheless be derated. First it is said that the language used in subsection (2) (*b*) is such that it can only apply where the premises used for " housing or main" tenance of his road vehicles . . . " are part of a larger hereditament, the other part being used for other purposes coming within the definition of factory purposes. In the present case, the whole of the hereditament is used for repair, i.e., maintenance of the appellants' vehicles, and it is argued that it is impossible to make the language of the subsection apply to it. If that were so it would lead to an absurd result: if a part—even 95 per cent.—were used for repairing vehicles the subsection would apply and that part would not be derated, but if the whole were so used the subsection would not apply and it would be derated. It is therefore necessary to examine the language closely to see whether it is capable of being read in a way which would avoid this absurdity.

On any view, the subsection is awkwardly drafted. The last part adopts the definition of " factory " in the 1901 Act " save " as aforesaid," and indicates that the earlier part of the subsection is to be read into the 1901 definition so as to narrow its scope. But the earlier part of the subsection is drafted in a form hardly appropriate for this purpose. The use of the word " notwithstanding " in the earlier part of the subsection is important. It must, I think, have been used on the assumption that if the premises used for maintenance, etc., stood by themselves as a separate hereditament, those premises would undoubtedly not be entitled to derating. To say that certain premises shall not be derated (which is the effect of this subsection read with section 4) notwithstanding that they are within the precincts of a factory clearly assumes that they would not be derated if they stood by themselves, and, although this may be going to the extreme limit of what is permissible as a matter of construction, I am prepared to hold that this subsection covers the present case by clear implication. In a situation so confused I attach little importance to the verbal criticism that the words used are " form part of *the* factory " instead of " form part of *a* " factory."

The second argument is quite different. Take a case where subsection (2) (*b*) clearly applies, the premises used for maintenance being within the precincts of a factory. Then it is argued that the subsection does not say that those premises are not to be derated: it merely says that they are to be excised from the factory. The premises must then be re-examined as a separate entity: if they are not by themselves a factory, they are not derated, but if they are in themselves a factory, then they are entitled to be derated. And, if that is so where the premises used for maintenance are within the precincts of a factory, it must equally be so if subsection (2) (*b*) is held to apply to the present case. I trust that that is a fair statement of the argument. In my opinion, that argument fails because it fails to take account of section 4. I shall not elaborate the point because it seems to me to be clear that the effect of section 4 is not to make a separate hereditament of a part of a factory which by reason of section 3 (2) (*b*) is deemed not to form part of the factory. All that section 4 does is to provide for the valuation of the whole original hereditament in two parts. The part affected by section 3 (2) (*b*) does not get the benefit of derating but the rest does, and then the valuation of the two parts are added together to make the valuation of the whole original hereditament. So there is no room for a re-examination of the part affected by section 3 (2) (*b*) to see whether or not it would be a factory if it stood by itself.

For these reasons I agree that this appeal should be dismissed.

Lord Keith of Avonholm. My Lords, the operations conducted by the appellants at their Aldenham depot have been described in full by my noble and learned friend on the Woolsack. They may be described broadly as amounting to repair and overhaul of omnibus bodies, including the renovation of seat upholstery and the repainting of the bodies. The work might indeed be called major repair and overhaul though that, I think, does not

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affect the issue. Nor does it, I think, matter that the work covers both repair due to ordinary wear and tear and repair due to major accidents. What is material is that no manufacturing operations are carried on at the depot, apart from the making of a negligible quantity of destination blinds, although reconditioning of defective parts removed from the omnibuses takes place.

The first point taken for the appellants was that these repair and overhaul operations did not amount to maintenance of road vehicles within the meaning of subsection (2) of section 3 of the Rating and Valuation (Apportionment) Act, 1928, as amended by the Local Government Act, 1929, section 69. Maintenance, it was said, must be confined to such operations as washing, cleaning, oiling, greasing and day-to-day minor repairs and adjustments. This was referred to as ordinary maintenance, as contrasted with maintenance that might extend to major repairs, overhauls and renovation. Much of this argument was based upon language used in the case of the *Potteries Electric Traction Co. Ltd.*[17] in this House.

My Lords, there is nothing said in that case which, in my opinion, supports this contention and there is much in the case which is against it. Apart from work done in a paint shop, to which I shall refer in a moment, it is clear that the operations carried out on the premises in that case were in the main manufacturing operations of a very extensive kind. It is only necessary to read the statement of facts as given in the report of the case in the Court of Appeal [18] to realise how predominant were the manufacturing operations carried on and how inextricably mixed with any repairs done on the premises. Lord Buckmaster, after explaining that in substance the work carried on was the work of the manufacture of a large number of articles incident to the construction and the maintenance of a fleet of omnibuses, said [19]: "But the construction of an article needed to maintain "differs in my opinion from what is meant by the word 'main- "'tenance' and, as already decided, it is the purpose to which "the premises are put and not the purpose to which their "products are devoted that is the question to be regarded." Lord Dunedin said [20]: "Maintenance is taken along with housing, "and points, I think, to something done to the vehicle on the "premises. . . . The ultimate fate of the part made is to main- "tain a vehicle. That does not show that maintenance is "done on the hereditament." Lord Warrington of Clyffe said [21]:

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[17] [1931] A.C. 151.

[18] [1931] 1 K.B. 385, 390; 46 T.L.R. 601.

[19] [1931] A.C. 151, 163–164.

[20] Ibid. 169.

[21] Ibid. 175.

"With one small exception there is in my opinion nothing in the "detailed description of the work which is inconsistent with the "general conclusion of the learned recorder," which was that the premises were an industrial hereditament. Lord Tomlin, after referring to the words in section 3 (2), a "place used by the "occupier for the housing or maintenance of his road vehicles "or as stables," said [22]: "The manufacture of spare parts for "use elsewhere is not in my view within the contemplation of "the subsection. The findings of fact of the learned recorder "make it plain in my opinion that the premises (other than the "paint shop) are not used for maintenance in the sense which "I have indicated." Lord Thankerton concurred in the opinion of Lord Buckmaster. All their Lordships agreed, however, that the paint shop was used for the maintenance of vehicles as being devoted to the repair of vehicles and should be excluded from the industrial column of the valuation list. Lord Dunedin said [23]: ". . . it seems pretty clear that the painting shop is used for "the purposes of real maintenance." Lord Warrington of Clyffe said [24]: "In his [the recorder's] description of the paint shop he "says it is used amongst other things for painting omnibuses, "lorries and cars. This is, I think, a matter of ordinary maintenance and the paint shop should therefore have been excluded "from the factory." This would not have been so, of course, if the paint shop had been devoted wholly to the painting of omnibus bodies made on the premises. The painting would then have been incidental to, and part and parcel of, a manufacturing operation. The finding, however, in the case was: "The paint "shop was used for painting omnibuses, lorries and cars and all "new woodwork produced in the body-building and wood-working "shop." From the opinions of Lord Buckmaster and Lord Warrington the House appears to have proceeded on the view that the paint shop was primarily used for the repainting of the fleet of omnibuses and other vehicles.

My Lords, I have devoted some time to the view taken of the facts of that case, but it is important to notice the issue which was before the House. It was whether it was relevant to consider the purpose for which the various parts were being made. It was the case for the revenue officer that the articles were being made for the repair of the omnibuses and that this was therefore maintenance. The judgment of the House was that it was what was actually done on the premises that was relevant and that

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[22] [1931] A.C. 151, 180.

[23] Ibid. 169.

[24] Ibid. 175.

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the ultimate purpose or destination of the articles made on the premises was immaterial. This is seen in the passages I have already quoted and is summed up in one sentence from the speech of Lord Buckmaster[25]: "But the construction of an article "needed to maintain differs in my opinion from what is meant "by the word 'maintenance' and, as already decided, it is the "purpose to which the premises are put and not the purpose to "which their products are devoted that is the question to be "regarded." My Lords, if repairs, whether major or minor, were not maintenance it was idle to raise or to decide this issue. Making articles for repair purposes could never be maintenance if making repairs was not of itself maintenance. In my opinion, there underlies all the speeches of their Lordships in that case an acceptance of the view that repairing of vehicles was maintenance. And that view, I think, became a matter of decision in their treatment of the paint shop in that case. The repainting of car and omnibus bodies cannot be treated as a matter of day-to-day maintenance. And if not, I see no ground for excluding any other type of repair which does not result in reconstruction, or the production of a new article. This was the view also of the Lands Valuation Appeal Court in Scotland in *Scottish Motor Traction Co. Ltd.* v. *Edinburgh Assessor*,[26] given after consideration of the decision of the House of Lords in the *Potteries Electric Traction Co.'s* case.[27] Two of the premises in that case were used partly for the repair, overhaul and reconditioning of the bodies of buses belonging to the occupiers of the premises and partly for similar work on motor vehicles of outsiders. So far as work was done for customers, that was held to be work in the nature of the business of a retail shop under section 3 (1) of the Act; and in so far as it was work on the occupier's own vehicles, to be maintenance of his vehicles under section 3 (2). In my opinion, that case was rightly decided.

It was submitted that what was "maintenance" in the sense of the Act was a question of law and not a question of fact. That may be so, but, once it is decided that maintenance includes repair in the wide sense I have indicated, the question of law has been largely, if not entirely, settled, and the only question left is whether what was done is repair or amounts to something more, namely, the remaking of a new article. That may, in certain cases where the facts are equivocal as between repair and reconstruction, raise questions of fact and degree which are essentially within the province of the fact-finding tribunal to determine, as has been observed by the learned Master of the Rolls in this case and also by Lord Fleming in the *Scottish Motor Traction Co.* case.[28] This would seem to have been the position in the case of *Hall & Co. Ltd.* v. *South-East Area of Surrey Assessment Committee*[29] to which we were referred. Certain operations described there as overhaul of road vehicles were held by the assessment committee not to be maintenance. On the other hand, the committee held that repair of vehicles which consisted in remedying all kinds of specific defects was maintenance. It was only the question of the overhauling operations on which appeal was taken to the Divisional Court and the court, treating the matter as one of fact and degree, refused to disturb the determination of the committee. There is no magic in the word "overhaul." The question is what is the nature of the operations. I agree with the learned Master of the Rolls that there is no ground on which it can be said that the Lands Tribunal here was not entitled to find that the overhauling done here was maintenance.

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[25] [1931] A.C. 151, 163–164.
[26] 1931 S.C. 416.
[27] [1931] A.C. 151.

I turn now to the other point in the case. In section 3 (1) of the Act "industrial hereditament" is defined as "a hereditament "(not being a freight-transport hereditament) occupied and used ". . . subject as hereinafter provided, as a factory or workshop." There is nothing, in my opinion, in the proviso to that subsection which excludes the appellants' depot from being an industrial hereditament. But passing to subsection (2) (*b*) of the Act, as amended, we find that any place used by the occupier for, inter alia, the maintenance of his road vehicles, shall, "notwith-"standing that it is situate within the close, curtilage or precincts "forming a factory . . . and used in connexion therewith, be "deemed not to form part of the factory . . . but save as afore-"said, the expressions 'factory' and 'workshop' have respec-"tively the same meanings as in the Factory and Workshop "Acts, 1901 to 1920." It is said that if 100 per cent. of a place used by the occupier as a factory is used for the maintenance of his road vehicles this subsection does not apply. We must find that the place used for the maintenance of road vehicles is part of a larger unit. My Lords, if 90 per cent. of a factory is to be deemed not to be part of a factory because it is used for the maintenance of the road vehicles of the occupier I have difficulty in seeing that a place used to the extent of 100 per cent. for the maintenance of the occupier's vehicles is a factory within the

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[28] 1931 S.C. 416.

[29] 4 D.R.A. 29.

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meaning of the subsection. The matter may be put in another way. If I ask what part of this factory is used for the maintenance of the road vehicles of the occupier and the answer is 100 per cent., then that part is to be deemed not to form part of the factory. To answer that 100 per cent. is not part of a whole reduces the situation, as the learned Master of the Rolls has indicated, to an absurdity. Whatever part is used for the maintenance of the occupier's vehicles is to be deemed not to form part of his factory. That fixes the meaning or extent of the factory in any particular case and, if the whole is so used, then none of it is to be deemed to be a factory. The point is a new one and did not arise in the *Scottish Motor Traction Co.* case [30] because there part of the premises was used for the repair of the vehicles of outsiders. So part was disqualified for derating as being business of the nature of a retail shop and part as used for maintenance of the occupier's own vehicles. It should be noted, however, that in the *Potteries Electric Traction Co.'s* case [31] the whole of the premises would have been excluded from derating under section 3 (2) (*b*) on the respondent's argument in that case. This would have provided a very short answer on the appeal if the contention of the appellants in the present case were sound. Though the point is novel and the circumstances that give rise to it perhaps unusual, the contentions of the appellants must, I think, for the reasons I have given, fail. If the whole is to be excised as being deemed not to form part of the appellant's factory, that, in my opinion, is the end of the case.

I would dismiss the appeal.

Lord Somervell of Harrow. My Lords, I have had the advantage of reading the opinion just delivered by my noble and learned friend on the Woolsack. I have nothing I wish to add on the question whether there was an error of law in the tribunal's finding as to maintenance. I would wish to add a few words on the construction of section 3 (2) (*b*) of the 1928 Act. The appellants are right in their submission that the wording is related to the case where the place used for the housing or maintenance of vehicles is situated within a factory. The word "notwith-"standing" is, however, I think the key to the solution of the problem. It means that a place used solely for the housing and maintenance of vehicles is a fortiori not a factory or workshop within section 3 (1). If this had not been the intended implication of the provision the wording would have been different. It would have run—" any place used by the occupier for the housing or " maintenance of his road vehicles situate within the close, " curtilage or precincts forming a factory or workshop and used " in connexion therewith shall be deemed not to form," etc.

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[30] 1931 S.C. 416.

[31] [1931] A.C. 151.

I agree that the appeal should be dismissed.

Lord Denning. My Lords, no one can doubt that this large depot of the London Transport Executive is a " factory." It is fully equipped with overhead cranes and machinery of all kinds. Many buses come in for overhaul and reconditioning. Every bus is taken to pieces—every part examined, repaired, reconditioned, or renewed—and the parts from many different buses are reassembled to form other buses. No bus that comes out of the depot can be identified with one that went in.

It is surprising to find that a depot which is so obviously a " factory " should not be regarded as an " industrial hereditament "; and I must say I view with some suspicion an interpretation of the statute which leads to such a result. The crucial section on which it depends is section 3 (2) (*b*) of the Rating and Valuation (Apportionment) Act, 1928: but, as this refers back to the Factory and Workshops Act, 1901, it is necessary to consider that Act as well. The Factories Act, 1937, does not affect the question: see section 159 (3) of that Act.

The best way, I think, of understanding these statutes is to take an instance which the legislature clearly had in mind, just as I said in *Escoigne Properties Ltd.* v. *Inland Revenue Commissioners*.[32] The most useful instance for present purposes is to take a manufacturing company which has a large main factory equipped with machinery at which it makes articles. It sends them out to its wholesale customers by its own delivery vans. It houses its vans on the premises and has a maintenance shop in which it does ordinary maintenance so as to keep them in running order. It has a canteen for the workers in the factory; and offices and a restaurant for the executive staff. It happens to have a small workshop in the grounds, too, where it makes different things unconnected with the main factory. The whole of the company's business is carried on in one large area enclosed by a ring fence.

In such a typical case the effect of the Factory and Workshops Act, 1901, is this:

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[32] [1958] A.C. 549, 565–566; [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406.

1. The factory building itself is, of course, a factory; and, in addition, every other building and place within the ring fence is prima facie to be regarded as part of " the factory " because it is " within the close or curtilage or precincts " of it, see section 149 (1) (*c*) and *Street* v. *British Electricity Authority.*[33] The garage for housing the motor-vans is, therefore, to be regarded as part of " the factory." So is a coach-house for horse-drawn vans. And stables for the horses. The maintenance shop (in which the vans are washed, cleaned and oiled, brakes adjusted, and so forth) is likewise to be regarded as part of " the factory." So, also, is the canteen for the workers who operate the machinery in the factory, see *London Co-operative Society Ltd.* v. *Southern Essex Assessment Committee.*[34] But none of these—the garage, coach-house, stables, maintenance shop, or canteen—would be regarded as factories in themselves. It is only because each is part of a larger factory area that each becomes part of " the factory."

2. The offices and restaurant for the executive staff stand, however, on a different footing. Notwithstanding that they are " within the close, curtilage or precincts," they are not to be deemed part of " the factory." The reason is because they are solely used for some purpose other than the manufacturing process, and are taken out of " the factory " by the first part of section 149 (4): see *Thomas* v. *British Thomson-Houston Co. Ltd.*[35] And, of course, considered separately, they are not a factory.

3. The small workshop where the company makes different things is deemed not to be part of " *the* factory," but is to " be " deemed *a* separate factory " under the second part of section 149 (4): see *Thurogood* v. *Van Den Berghs & Jurgens Ltd.*[36]

In such a typical case the effect of the derating provisions of the Rating and Valuation (Apportionment) Act, 1928, is this:

1. The whole of the enclosed area within the ring fence is to be treated for rating purposes as a single hereditament: see *Gilbert* (*Valuation Officer*) v. *Hickinbottom & Sons Ltd.*[37]

2. The whole of the hereditament is prima facie to be regarded as an " industrial hereditament " within section 3 (1) of the 1928 Act. The reason is because, when you look at it as a whole—as you must—you find it is primarily occupied and used

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[33] [1952] 2 Q.B. 399, 409; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679.

[34] [1942] 1 K.B. 53; [1942] 3 All E.R. 252.

[35] [1953] 1 W.L.R. 67; [1953] 1 All E.R. 29.

[36] [1951] 2 K.B. 537, 546; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.

[37] [1956] 2 Q.B. 40, 48; [1956] 2 W.L.R. 952; [1956] 2 All E.R. 101.

for factory purposes and not for any of the purposes in provisos (*a*) to (*f*): see *Dalziel Co-operative Society* v. *Motherwell Assessor.*[38]

3. But in preparing the valuation list, an apportionment must be made of the annual value of the hereditament so as to apportion it between the use for industrial purposes and the use for other purposes, see section 4 (1).

4. In making the apportionment, the main factory building itself is to be classed as "industrial." So must every other building and place within the enclosed area unless it is, by statute, taken out of the category of a factory: see section 4 (2) (*a*). The canteen for the workers is, therefore, to be classed as "industrial." But the offices and restaurant for the executive staff are to be classed as "non-industrial," because they are taken out of "the factory" by the Factory Act, 1901. And the garage and maintenance shop are to be classed as "non-"industrial," because they are taken out of "the factory" by the Rating Act, 1928. But the small workshop is to be classed as "industrial" because it is deemed to be a separate factory under the Factory Act, 1901.

That is how the Acts operate in a typical case. The important thing to notice is that there is one whole enclosed factory area—a single hereditament—which is bound to be classed as an "industrial hereditament" except in so far as, by statute, parts of it are to be excluded. We are here concerned with the excluding sections, and in particular with section 149 (4) of the Factory Act, 1901, and section 3 (2) (*b*) of the Rating Act, 1928. A perusal of these sections shows, to my mind, quite clearly that they are both dealing with *parts* of a larger whole hereditament, and not with a whole hereditament itself. The wording of both sections is precise and definite on the point. I will set them next to one another to show how close to one another they are and italicize the material words:

Section 149 (4) of the Act of 1901 provides: "Where a *place* "*situate within the close, curtilage or precincts forming a factory* "*or workshop* is solely used for some purpose other than the "manufacturing process or handicraft carried on in the factory or "workshop, that *place shall not be deemed to form part of the* "*factory or workshop for the purposes of this Act*, but shall, if "otherwise it would be a factory or workshop, be deemed to be a "separate factory or workshop."

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[38] 1932 S.C. 413, 419.

Section 3 (2) (*b*) of the Act of 1928 provides: "*for the purposes* "*of this Act* any *place* used by the occupier for the housing or "maintenance of his road vehicles or as stables *shall*, notwith-"standing that it is *situate within the close, curtilage or precincts* "*forming a factory or workshop* and used in connexion therewith, "*be deemed not to form part of the factory or workshop.*"

No one reading those two sections can doubt what Parliament intended. In section 149 (4) it envisaged a place within a factory —such as the *offices* in my illustration—and enacted that notwithstanding that those offices were within the larger whole factory area, nevertheless they were to be excluded from "the "factory." In section 3 (2) (*b*) it envisaged a place within a factory—such as *the garage and maintenance shop* in my illustration—and enacted that notwithstanding that they were within the larger whole factory area and, indeed, part of "the factory" for Factory Act purposes, nevertheless they were to be excluded from "the factory" for Rating Act purposes.

I see no possible justification in either section for supposing that Parliament intended to deal with a single hereditament which was not part of a larger whole. It certainly did not do so in section 149 (4). And likewise in section 3 (2) (*b*) which contains identical wording on the point. Section 3 (2) (*b*) cannot be made to apply to a single hereditament except by rewriting it—and filling in a supposed gap—so as to make it say that the place in question "shall be deemed not (here "insert *to be nor*) to form part of (here strike out 'the' and "put *a*) factory or workshop." No such drastic filling in of a gap—or alteration of words—is permissible to any court unless there is no other way of making sense of it.

The Master of the Rolls saw the difficulty in making this rewriting but thought that it was the only way in which absurdity could be avoided. But I would suggest that there is nothing unreasonable or absurd about the section—provided always that you construe the word "maintenance" properly. The difficulty has arisen solely because the word "maintenance" has not been properly construed.

Let me say, then, how the word "maintenance" should, in my opinion, be construed. Its meaning can be gleaned from its context. It is used in company with two associated words "housing" and "stables": and it is to be known by its associates. Noscitur a sociis. The one thing in common about "housing" and "stables" is that neither of them are "factories" by themselves in any sense of the word. Each only becomes part of a "factory" by coming within an enclosed factory area. Likewise, it seems to me that a place for "maintenance" of vehicles, in section 3 (2) (*b*), denotes a place which is not by itself a "factory" but only becomes part of a factory by coming within an enclosed factory area—such as the maintenance shop in my illustration.

"Maintenance" in this section means, I think, *ordinary maintenance*. It means washing, cleaning, oiling, minor adjustments and running repairs. A garage where minor repairs of that kind are done is not on that account to be reckoned as a "factory" with all that that entails. Just as a kitchen of a restaurant is not to be regarded as a "factory" simply because articles are altered, ornamented or finished in it, see *Wood* v. *London County Council*[39]: so also a garage is not to be regarded as a factory because ordinary maintenance is done there: see *Potteries Electric Traction Co. Ltd.* v. *Bailey*,[40] *per* Lord Warrington. Such is clearly the position since 1937 (see section 151 (1) (vi) of the Act of 1937) and I see no reason to doubt that it was the same under the Act of 1901. In this respect the Act of 1937 only declares and clarifies the law. It does not alter it.

When "maintenance" is so construed, there is nothing unreasonable or absurd in the Act. Every garage which does the *ordinary maintenance* of road vehicles (as I have described it) must bear the full rates. It is on an equal footing with every other such garage. No such garage is entitled to be derated, no matter whether it is occupied and used by a carrier or haulage contractor (who has no factory) or by a manufacturer (who has a factory) and no matter whether it is a single hereditament or part of a larger whole. The reason is because, when occupied and used as a single hereditament, it is not a "factory" within the Factory Act: and when it is part of a larger factory area, it is taken out of "the factory" by section 3 (2) (*b*) of the Rating Act. That, indeed, is the very object of section 3 (2) (*b*). It is to see that a manufacturer (who has a factory) is not in a better position—so far as the rating of his garage is concerned—than a carrier or haulage contractor (who has no factory). If it were not for section 3 (2) (*b*), the manufacturer who garages his fleet of lorries in his own works would be entitled to have his garage derated—which would be very unfair to the carriers and hauliers who have similar garages liable to full rates.

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[39] [1941] 2 K.B. 232; 57 T.L.R. 499; [1941] 3 All E.R. 1.

[40] [1931] A.C. 151, 173, 175.

So much for garages. But repair shops—where major repairs are done—stand on a different footing. These are " factories " within the Factory Act. I am quite sure that Parliament did not mean to put a carrier or haulier—who has his own repair shop—in a worse position than a repairing contractor with a like shop. As I read this Act, every workshop which does major repairs to road vehicles (including overhauling and reconditioning)—as distinct from ordinary maintenance—is entitled to be derated. (I am speaking, of course, only of workshops proper —not of those which are primarily occupied for the purposes of a " retail shop.") Every such workshop is entitled to be derated, no matter whether it is occupied and used by a carrier or haulage contractor for the repair of his own vehicles, or by one company for the repair of another company's vehicles, and no matter whether it is a single hereditament or part of a larger whole. If it is a single hereditament, it is a " factory " in itself. If it is part of a larger factory area, it is, again, to be reckoned as a " factory," either as being " part " of the larger factory, or as being " deemed *to be a* separate " factory " within the second part of section 149 (4), see *Thurogood* v. *Van Den Berghs & Jurgens Ltd.*[41] This explains the use of the words " neither *to be nor* to form part of *a* " factory " in section 4 (2) (*a*) of the 1928 Act. If the words " neither to be " were omitted, every workshop within a larger factory area—of such a character that it is deemed not to form part of the factory but to be a separate factory in itself—would rank as non-industrial, which would be absurd.

It is significant that the words " neither to be " are inserted in section 4 (2) (*a*)—and also the word " a " is used instead of " the "—whereas there is nothing of the kind in section 3 (2) (*b*). This affords strong support for the construction I have put upon section 3 (2) (*b*), namely, that it applies only to a part of a larger whole. It is also worth noticing that the Act itself in section 5 (2) uses " maintenance " as different from " repair."

Thus the whole Act fits together as a consistent whole when " maintenance " is construed as I have suggested. But if it is treated as having so wide a meaning as to include overhauling and reconditioning and major repairs (as it was treated by the

[41] [1951] 2 K.B. 537.

Railway and Canal Commission in the *Charlton* case[42] and by the Land Valuation Court in the *Scottish Motor Traction* case[43]), you find yourself in these difficulties:

(1) If you take section 3 (2) (*b*) in its natural meaning you are forced into the absurdity (which the Master of the Rolls pointed out) of saying that if a workshop doing major repairs is a single hereditament, it will be derated, but if it is 90 per cent. of a larger factory hereditament, it will not be derated. The only way of avoiding this absurdity is to write words into section 3 (2) (*b*) for which there is no justification.

(2) Even if you rewrite section 3 (2) (*b*) in that way, you are still forced into the equal absurdity of saying that if a workshop is used by the occupier for doing major repairs to his own vehicles, it will not be derated; but if it is used by him for doing major repairs to someone else's vehicles, it will be derated. That cannot have been intended by Parliament. It means that a haulage contractor can always get his premises derated by forming one company to own the vehicles and another company to occupy the workshop. Derating should depend on the use to which the premises are put, not on the ownership of the vehicles.

(3) In any case you give so much elasticity to the word "maintenance" that you open the door to inequality of treatment as between similar premises up and down the country. No one can be satisfied with a system of adjudication which results in the derating of the workshops in *Hall & Co. Ltd.* v. *South-East Area of Surrey Assessment Committee*[44]: and in the full rating of the workshops in the *Charlton* case,[45] when in truth no sensible distinction can be drawn on the facts.

In the result, I am clearly of opinion that the right construction of section 3 (2) (*b*) is that which I have stated. But it is said that there is a decision of this House which prevents your Lordships adopting this construction, namely, the decision about the paint shop in *Potteries Electric Traction Co. Ltd.* v. *Bailey*.[46] That is, to my mind, a decision on the particular facts of the paint shop and nothing else. The decision may be binding on your Lordships if there is another such paint shop anywhere, but it is not, in my opinion, binding for anything else. If your Lordships were to elevate that particular precedent into a binding decision on the meaning of "maintenance" you would, I believe,

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[42] 13 D.R.A. 64.
[43] 1931 S.C. 416.
[44] 4 D.R.A. 29.
[45] 13 D.R.A. 64.
[46] [1931] A.C. 151.

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Lord Denning.

carry the doctrine of precedent farther than it has ever been carried before. Just take the steps in the reasoning. It goes like this: The word "maintenance" includes painting in the paint shop. That shows that it goes beyond ordinary maintenance (as I have described it) and include repairs. Hence it is wide enough to include overhauling and reconditioning—and even reassembling into different vehicles. But when it is pointed out that, if that meaning is adopted, it will lead to an absurdity in the statute—that it leaves a gap which Parliament cannot have intended—then it is said you must fill in the gap by writing into the statute words which are not there and by altering other words. At that point in the argument you come face to face, not with a particular precedent on this Act, but with a fundamental principle on all Acts, which is this: The judges have no right to fill in gaps which they suppose to exist in an Act of Parliament, but must leave it to Parliament itself to do so: see *Magor and St. Mellons Rural District Council* v. *Newport Corporation*.[47] No court is entitled to substitute its words for the words of the Act: see *Goodrich* v. *Paisner*.[48]

It seems to me that when a particular precedent—even of your Lordships' House—comes into conflict with a fundamental principle, also of your Lordships' House, then the fundamental principle must prevail. This must at least be true when, on the one hand, the particular precedent leads to absurdity or injustice and, on the other hand, the fundamental principle leads to consistency and fairness. It would, I think, be a great mistake to cling too closely to particular precedent at the expense of fundamental principle. Here every principle of construction requires this House to limit the word "maintenance" to ordinary maintenance and not to extend it to the vast repairs and reconditioning and reassembling done in this depot. It is, to my mind, clearly an industrial hereditament entitled to be derated.

I would therefore allow this appeal.

Solicitors: *M. H. B. Gilmour; Solicitor of Inland Revenue.*

F. C.

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[47] [1952] A.C. 189; [1951] 2 T.L.R. 935; [1951] 2 All E.R. 839.

[48] [1957] A.C. 65, 88; [1956] 2 W.L.R. 1053; [1956] 2 All E.R. 176.

J. C.*

1959
March 19.

NEWCASTLE CITY COUNCIL . . . . . APPELLANT;

AND

ROYAL NEWCASTLE HOSPITAL . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—New South Wales—Rates and rating—Exemption—Hospital (public)—Owner of adjoining unfenced physically unused vacant land—Intentional acquisition for purposes of hospital—Amenity advantages—Whether " used " for purposes of hospital—Statutory exemption from rates—Local Government Act, 1919 (*N.S.W.*), *s.* 132 (1) (*d*).

User of Land—Whether land " used "—Hospital—Adjacent virgin land owned by hospital with amenity value—Whether " used . . . for " the purposes " of the hospital—Local Government Act, 1919 (*N.S.W.*), *s.* 132 (1) (*d*).

Section 132 of the Local Government Act, 1919, of New South Wales provides: "(1) All land in a municipality . . . shall be "rateable except . . . (*d*) land which belongs to any public "hospital . . . and is used or occupied by the hospital . . . for the "purposes thereof; . . ."

The respondent, a public hospital for the treatment of tuberculosis, owned 291 acres of unfenced land in its virgin state adjoining other land in the City of Newcastle owned by and on which the hospital stood. The 291 acres, of which the hospital made no physical use—it was vacant land intersected by steep gullies and heavily timbered—had been acquired for the purposes of the hospital, namely, to keep the atmosphere clear and unpolluted; to prevent building on the land; to provide quiet and serene surroundings for the patients; and to give room to expand the activities of the hospital. On a claim by the appellant local authority to recover rates on the 291 acres:—

Held, that an owner can use land by keeping it in its virgin state for his own special purposes, and the 291 acres, from which the hospital intentionally derived the above-specified advantages, were " used " for the purposes of the hospital and, accordingly, exempt from the payment of rates under section 132 (1) (*d*) of the Act of 1919.

Doubted, but observations on, whether the land was " occupied " by the hospital.

Judgment of the High Court of Australia (1957) 96 C.L.R. 493 affirmed.

APPEAL (No. 38 of 1958), by special leave, from a judgment of the High Court of Australia (March 21, 1957), affirming an order

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* *Present*: VISCOUNT SIMONDS, LORD COHEN, LORD SOMERVELL OF HARROW and LORD DENNING.

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of the Supreme Court of New South Wales (June 18, 1956), which dismissed the present appellant's (the Newcastle City Council's) appeal from a judgment of Richardson J. (June 24, 1955), holding that the respondent, the Royal Newcastle Hospital, was not liable to pay rates in respect of a plot of land owned by it in the City of Newcastle.

The following facts are taken from the judgment of the Judicial Committee: In the city of Newcastle, New South Wales, there was a hospital called the Royal Newcastle Hospital, which received patients suffering from tuberculosis. It had about 100 beds. It was set in grounds laid out with lawns and gardens. Those grounds covered 17½ acres and were enclosed with a ring fence. Outside the fence the hospital owned 18½ acres of rough ground marked off by five white posts. Beyond that rough ground the hospital owned 291 acres of land which was still in its virgin state. Those 291 acres were traversed by ridges and gullies, which were heavily timbered, with a good deal of underwood. The gullies were steep and rough, some of them so steep that they were impassable. There was very little flat land. There were a few bush tracks, one of which was well defined: but there was no evidence sufficient to establish that it was used by patients or by the nursing staff. There was, in short, no physical use of the 291 acres by the hospital. It was just vacant land.

The city council claimed that the hospital was liable to pay rates on those 291 acres for the years 1946 to 1952 inclusive. It did not seek to make the hospital liable on either the 17½ acres or the 18½ acres, but only on the 291 acres. The sum claimed was £A4,001 9s. 8d.

At the hearing of the action, Richardson J. held that the 291 acres were exempt from rates. His decision was affirmed by a majority of the Supreme Court of New South Wales (Roper C.J. in Equity and Maguire J., with Owen J. dissenting), and their decision was in turn affirmed by a majority of the High Court of Australia (Williams, Webb and Taylor JJ., with Fullagar and Kitto JJ. dissenting).

The question in this appeal was whether the 291 acres were exempt from rating under the provisions of section 132 of the Local Government Act, 1919, of New South Wales, which provided: "(1) All land in a municipality . . . shall be rateable "except . . . (*d*) land which belongs to any public hospital . . . "and is used or occupied by the hospital . . . for the purposes "thereof; . . ."

1959. Feb. 12, 16, 17. *B. J. M. MacKenna Q.C.* and *Peter Oliver* for the appellant. There is no dispute that the respondent is a public hospital; no dispute that the land in question belongs to it, and no dispute about the amount of the rate, if due—£A4,001 9s. 8d. The question is whether the respondent uses or occupies the land for the purposes of the hospital. The provisions of the New South Wales Act are very different from the rating law of England; the Act makes the owner liable to pay the rates; occupation does not appear to come into it in the ordinary case; it is not a condition of liability that the land shall be beneficially occupied. The appellant's case is that to prove that the land is used or occupied for the purposes of the hospital it is not enough to prove that the hospital owns the land and is thereby enabled to prevent its being used by others so as to impair the amenities of the developed land, which is admittedly used and occupied by the hospital. Nor is it enough for the hospital to prove that its ownership of the land will enable it to develop and use it at some future date for its own purposes. It is conceded that the ownership of the land is advantageous to the hospital, so that it can exclude others from using the land to the detriment of the hospital; the argument is that something more is needed to constitute use and occupation, and that nothing more was proved in the present case.

The derivation of an advantage from vacant or waste land—from the non-user of such land—is not in itself enough to constitute use or occupation of that land. The use of land, according to the ordinary meaning of the word, does import some activity on or in relation to the land. There is nothing comparable in this case with the actual physical user of the station-master's house in *Knowles* v. *Newcastle Corporation*.[1] It does not follow from *Warringah Shire Council* v. *Salvation Army* (*N.S.W.*) *Property Trust*,[2] in which it was recognised that land could properly be said to be used for the purposes of an institution although it was not subjected to any active use, that the present respondent is not rateable. If it is a question of degree, then the present case is clearly on the other side of the line. To buy the land simply for the purpose of preventing its being acquired by somebody else is not in itself either use or occupation. It is owned for the purpose of preventing houses and/or factories being erected on the land, but it is not used or occupied for that purpose. Mere proof of an advantage derived as occupier of the developed land does not amount to proof of user or occupation of the adjoining vacant land.

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[1] (1909) 9 C.L.R. 534.

[2] 15 L.G.R.(N.S.W.) 91.

There is a distinction between using a moorland as a catchment area and drawing water off that area (see *Liverpool Corporation* v. *Chorley Union Assessment Committee and Withnell Overseers*[3]) and owning the plot of land here; all that one can be said to have been doing here is to prevent somebody generating smoke, dirt and noise; that is a real distinction. As to the authorities on "occupation," *McLean* v. *Burrangong Shire Council*[4] and *Colonial Treasurer* v. *Albury Municipal Council*[5] are decisions on the present Act; if derivation of any advantage means occupation of the land, then the latter case is against the appellant here. *Commissioners of Taxation* v. *Trustees of St. Mark's Glebe*[6] is cited for the way in which it dealt with the lands "not occupied or used for any purpose." So far as it is permissible to use English cases in the construction of the New South Wales Act, reliance is placed on *Associated Cinema Properties Ltd.* v. *Hampstead Borough Council*,[7] where it is said that there must be some evidence of user to constitute proof of rateable occupation for the purposes of the English Acts. See also *Westminster Council* v. *Southern Railway Co., etc.*[8] There are a few English cases on the meaning of the word "use"; *Brake* v. *Inland Revenue Commissioners*[9] is cited for the use of the word "physical," and it is submitted that intangible use is not enough for section 132 here. In the *Liverpool Corporation* case[10] there was evidence of physical use being made of the land. The respondent here did not use or occupy the land; alternatively, it did not use or occupy it for the purposes of the hospital.

Gordon Wallace Q.C. (Australia) and *J. G. Le Quesne* for the respondent. In section 132 the word "or" is disjunctive; other sections say "use and occupation." It is not necessary to show beneficial occupation; it is sufficient if it can be shown that the land is "occupied for the purposes of" the hospital. It is clear that the legislature is drawing a distinction between "used" and "occupied." There is authority for the view that if a person has the legal possession of land, and no one else—and this is essential—is shown to have the right of possession, then prima facie the former is in occupation—not beneficial occupation: *Doncaster Union Assessment Committee* v. *Manchester, etc., Railway Co.*[11] All that the respondent here then has to do is to go one step further and show that it is " for the purposes " of the hospital. On " occupation " see *Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.*,[12] which is relied on. It is important to remember that the waterworks company in the *Liverpool Corporation* case[13] was in fact receiving the flow of water from the land before it bought it; it was a natural watershed before they acquired it. Under New South Wales law legal ownership—ownership in fee simple—the right to legal possession, is sufficient to constitute our type of occupation, unless the land is truly derelict. This land is not derelict or waste land; there was evidence (though not accepted) that the staff and patients used the tracks on the land. [Reference was also made on " occupation " to the *St. Mark's Glebe* case[14]; *Rex* v. *Mayor, etc., of London*[15]; *Winstanley* v. *North Manchester Overseers*[16]; the *Halkyn* case[17] and *Westminster Council* v. *Southern Railway Co., etc.*[18]]

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[3] [1911] 1 K.B. 1057; 27 T.L.R. 230; [1912] 1 K.B. 270; 28 T.L.R. 177; [1913] A.C. 197; 29 T.L.R. 246.

[4] (1914) 14 N.S.W.S.R. 291.

[5] (1915) 15 N.S.W.S.R. 320.

[6] [1902] A.C. 416; 18 T.L.R. 620.

[7] [1944] K.B. 412; 60 T.L.R. 275; [1944] 1 All E.R. 436.

[8] [1936] A.C. 511, 529; 52 T.L.R. 541; [1936] 2 All E.R. 322.

[9] [1915] 1 K.B. 731, 733; 31 T.L.R. 177.

[10] [1913] A.C. 197.

With regard to the word " use " in this context and in relation to the facts of this case, it is a word of wide import—that is important. In this case it depends on the type of purpose and the type of subject-matter. It has been variously defined as, e.g., " to obtain the benefit of," " to employ to any purpose," " to enjoy the benefit of " and " to avail oneself of." This particular land was purchased for the express purpose of allowing the sanatorium to be built, which, without it, would never have come into existence. Secondly, the land has been said by witnesses to play a material part in the treatment of patients. Further, it has prevented and still prevents encroachment of industry and possible contamination of the air. So far as " use " is concerned, it falls fairly and squarely within the *Liverpool Corporation* case.[19] It is not necessary in this case that there should be overt acts of physical use; by the nature of its purposes and objects—curing of its patients—by the special nature of the disease and the type of treatment, the uses above referred to are real uses. The hospital is reaping an advantage or a benefit from this land—to use words taken from English cases.

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[11] (1894) 71 L.T. 585, 587; 10 T.L.R. 567.

[12] [1895] A.C. 117; 11 T.L.R. 132.

[13] [1913] A.C. 197.

[14] [1902] A.C. 416.

[15] (1790) 4 T.R. 21, 26.

[16] [1910] A.C. 7, 11.

[17] [1895] A.C. 117, 132.

[18] [1936] A.C. 511, 529.

[19] [1912] 1 K.B. 270.

A settlor who has acquired some 2,000 or 3,000 acres and puts up a hut or shack on a corner of it and proceeds to develop it gradually is in occupation of the whole. *Knowles's* case [20] was under a section different from section 132; the question of occupancy was not in issue, but whether the land was used for the purposes of the government railways. [*London County Council* v. *Hackney Borough Council* [21] was also referred to.] Of the New South Wales cases, *McLean's* case [22] is irrelevant; the wording of the section is different, and they did not have in mind the distinction between occupation and use. The *Colonial Treasurer's* case [23] was also on a different section. The land in question here was used and occupied for the purposes of the hospital and exempt from rating.

MacKenna Q.C. in reply. It was said for the respondent that the test of occupancy is satisfied by proof of ownership coupled with proof that nobody else has been put into occupation other than the owner. From the outset the courts in Australia—except Williams J. in the instant case—have refused to apply that test to the word "occupy" in section 132. Isaacs J. was right in *Knowles's* case [24] in saying that "occupy" is satisfied by nothing less than proof of that which would satisfy the test of beneficial or rateable occupation in England. *McLean's* case [25] is against the submission that "occupy" had any narrower meaning than the concept of rateable or beneficial occupation. See also the *Colonial Treasurer's* case.[26] The decision in the *St. Mark's Glebe* case [27] is also opposed to the respondent's argument; the difference in the wording of the two sections helps the appellant here because it points even more strongly to the insufficiency of proof of ownership being enough to establish proof of occupation. Apart from authority, it is submitted that occupation for a purpose connotes beneficial occupation. If it is right that the requirement of section 132 is beneficial occupation, and something more must be proved than legal possession, then on the principles applied by the House of Lords in the *Liverpool Corporation* case [28] there was no occupation here. What the Court of Appeal said in the *Associated Cinema's* case [29] is in line with the *Liverpool Corporation* case.[30] Buckley L.J. in the *Liverpool Corporation* case in the Court of Appeal [31] went beyond anything said by any other judge if he was holding that the derivation of the benefit from the property constituted occupation without regard to whether there was user of the land.

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[20] 9 C.L.R. 534.

[21] [1928] 2 K.B. 588, 595; 44 T.L.R. 592.

[22] 14 N.S.W.S.R. 291.

[23] 15 N.S.W.S.R. 320.

[24] 9 C.L.R. 534.

[25] 14 N.S.W.S.R. 291.

[26] 15 N.S.W.S.R. 320.

[27] [1902] A.C. 416.

[28] [1913] A.C. 197.

[29] [1944] K.B. 412.

[30] [1913] A.C. 197.

Any distinction between vacant houses and vacant land which may be drawn for the purposes of English rating law certainly ought not to be imported into the construction of the New South Wales Act: in this connection see *Townley Mill Co. (1919) Ltd.* v. *Oldham Assessment Committee* [32] and *Smith* v. *New Forest Union Assessment Committee.*[33] In English law vacant lands are not rateable any more than vacant houses. As to " use," the contest is between tangible and intangible use, the latter being the only use on which the respondent's argument can be based. Intangible use is not what is meant by the section: *Brake's* case.[34] In the ordinary sense " use " does import something active—putting to use in the physical sense.

March 19. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: It should be noticed at the outset that rates are levied in New South Wales, not on the occupiers, as in England, but on the owners: and they are calculated, not by reference to the annual value, as in England, but by reference to the unimproved capital value: and all land, occupied or unoccupied, is subject to the payment of rates unless it can be brought within one of the statutory exceptions. English rating decisions are, therefore, not of much help.

The Royal Newcastle Hospital is undoubtedly liable to pay rates on these 291 acres, unless the land comes within section 132 (1) (*d*) of the Local Government Act, 1919, which exempts " land " which belongs to any public hospital, public benevolent institu" tion, or public charity, and is used or occupied by the hospital, " institution or charity, as the case may be for the purposes " thereof."

The hospital acquired the land in a series of parcels from 1926 to 1946, namely, 92 acres in 1926, 4 acres in 1934, 10 acres in 1944, and 220 acres in 1946. There is no doubt that the hospital acquired all the land for the purposes of the hospital. Indeed, when the latest portion of it (220 acres) was compulsorily acquired in 1946, the Government Gazette expressly stated that it was

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[31] [1912] 1 K.B. 270, 287–288.

[32] [1937] A.C. 419; 53 T.L.R. 205; [1937] 1 All E.R. 11.

[33] (1889) 61 L.T. 870.

[34] [1915] 1 K.B. 731.

"resumed for the purposes of the Newcastle Hospital." According to the evidence these purposes were to keep the atmosphere clear and unpolluted: to prevent building upon the land and so act as a barrier against the approach of factories and houses: to provide quiet and serene surroundings for the patients: and to give room to expand the activities of the hospital. The land was undoubtedly *acquired and owned* for those purposes. But was it *used* or *occupied* for those purposes? That is the question.

Their Lordships are of opinion that it was *used* for those purposes. Mr. MacKenna submitted that an owner of land could not be said to use the land by leaving it unused: and that was all that had been done here. Their Lordships cannot accept this view. An owner can use land by keeping it in its virgin state for his own special purposes. An owner of a powder magazine or a rifle range uses the land he has acquired nearby for the purpose of ensuring safety even though he never sets foot on it. The owner of an island uses it for the purposes of a bird sanctuary even though he does nothing on it, except prevent people building there or disturbing the birds. In the same way this hospital gets, and purposely gets, fresh air, peace and quiet, which are no mean advantages to it and its patients. True it is that the hospital would get the same advantages if the land were owned by the Crown or by a trust which had determined to keep it in a natural state, or by an owner who was under a restrictive covenant not to build on the land. But the advantages then would be fortuitous or at any rate outside the control of the hospital. Here they are intended, and that makes all the difference.

In these circumstances it is unnecessary for their Lordships to consider whether the 291 acres were "occupied" by the hospital: but in view of the argument submitted to them, their Lordships would say a few words on it. The hospital was undoubtedly in legal possession of the 291 acres; for the simple reason that, where no one else is in possession, possession follows title. But legal possession is not the same as occupation. Occupation is matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering, see Pollock and Wright on Possession in the Common Law, pp. 12, 13. There must be something actually done on the land, not necessarily on the whole, but on part in respect of the whole. No one would describe a bombed site or an empty unlocked house as "occupied" by anyone: but everyone would say that a farmer "occupies" the whole of his farm even though he does not set foot on the woodlands within it from one year's end to another. Their Lordships have some doubt

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whether these 291 acres were "occupied" by the hospital, because they were not fenced in or enclosed in any way, and it is difficult to say they were so much linked with the hospital grounds as to form part of an entire whole. But it is unnecessary to come to a conclusion on the point.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs.

Solicitors: *Kimbers; Light & Fulton.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*
1958
May 8, 12, 13;
June 25.

CADE . . . . APPELLANT;

AND

BRITISH TRANSPORT COMMISSION . . RESPONDENTS.

Railway—Statutory duty—Permanent way men—Man killed on line—"Repairing the permanent way"—Tightening loose fishplate nuts—Whether work of "repairing"—Meaning of "repair"—Meaning of "working"—Whether "danger . . . likely to arise"—Railway Employment (Prevention of Accidents) Act, 1900 (63 *&* 64 *Vict.* c. 27), *s.* 1—*Prevention of Accidents Rules,* 1902 (*S.R. & O.*, 1902, *No.* 616), *r.* 9.

Fact or Law—Degree, question of—Statutory duty—Whether "danger "... likely to arise."

Rule 9 of the Prevention of Accidents Rules, 1902, provides: "With the object of protecting men working singly or in gangs "on or near lines of railway in use for traffic for the purpose of "relaying or repairing the permanent way of such lines, the rail-"way companies shall, after the coming into operation of these "rules, in all cases where any danger is likely to arise, provide "persons or apparatus for the purpose of maintaining a good look-"out or for giving warning against any train or engine approaching "such men so working."

The plaintiff's husband, an experienced lengthman in the employment of the defendants, the British Transport Commission, was struck and killed by one or other of two passing goods trains while bending over to begin tightening-up a loose fishplate nut on a railway line of the defendants. It was daylight and there was clear visibility up and down the lines for about a quarter of a mile.

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* *Present*: Viscount Kilmuir L.C., Lord Morton of Henryton, Lord Cohen, Lord Evershed and Lord Birkett.

The trains were travelling at 15 to 20 miles per hour and the number of trains going each way was an average of two or three an hour. The deceased was working alone and no look-out had been provided. The widow sued the defendants for damages under the Fatal Accidents Acts, 1846–1908, alleging a breach of statutory duty:—

Held, (1) "repair" involved putting right that which had gone wrong, and that the work on which the deceased was engaged was accordingly "repairing the permanent way," within rule 9 of the Rules of 1902.

Dicta in *Berriman* v. *London & North Eastern Railway Co.* [1946] A.C. 278, 294, 307, 314; 62 T.L.R. 170; [1946] 1 All E.R. 255 applied.

Dictum of Donovan J. in *Reilly* v. *British Transport Commission* [1957] 1 W.L.R. 76, 79; [1956] 3 All E.R. 857 approved.

Per Lord Morton. *Semble*, the deceased was "working" on the line "for the purpose of . . . repairing the permanent way" within the meaning of rule 9 from the time when he set off along the line to examine the track for defects.

Judson v. *British Transport Commission* [1954] 1 W.L.R. 585; [1954] 1 All E.R. 624 distinguished.

(2) That the provision for maintaining a look-out and giving warning "in all cases where any danger is likely to arise" did not impose an absolute duty on the respondents; the words "danger ". . . likely to arise" must be given their ordinary meaning, and in determining whether or not the condition was fulfilled the court was entitled to take into consideration such factors as the site, the amount and speed of traffic, the nature of the work, the visibility—and the experience of the deceased. Though some allowance had to be made for temporary inadvertence and distraction, some assumption must be made as to the behaviour of the man engaged. The question was one of degree and therefore of fact.

Hutchinson v. *London & North Eastern Railway Co.* [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 330 distinguished.

(3) (Lord Cohen dissenting) that in all the circumstances danger was not likely to arise and the defendants were not liable.

Decision of the Court of Appeal [1957] 1 W.L.R. 947; [1957] 3 All E.R. 87 affirmed.

APPEAL from the Court of Appeal (Hodson, Parker and Ormerod L.JJ.).

This was an appeal from an order of the Court of Appeal made on July 15, 1957, upholding an order made by Barry J. at Leeds Assizes on January 17, 1957, in an action in which the appellant, Phyllis Maud Cade, was plaintiff, and the respondents, the British Transport Commission, were defendants.

The facts, stated by Viscount Kilmuir L.C. and Lord Morton of Henryton, were as follows: The appellant was the widow and administratrix of the estate of Laurence Cade. She claimed damages in respect of the death of her husband on November 12, 1953, in the following circumstances. At the time of his death the deceased was a sub-ganger lengthman in the employ of the respondents, with some four years' experience of that gang. He had been appointed a sub-ganger in October, 1953. He was a qualified look-out man familiar with the British Railways' Rule Book. He was working under the orders of one Winfield, the foreman ganger, on a section of the Alexandra Dock to Stairfoot railway at Hull. The length for which Winfield was responsible included the section of line shown on the agreed plan and photographs. It consisted of two sets of running lines described as a main line to distinguish them from sidings but used by goods trains only. The length was what is called a permissive block, that is to say, a number of trains up to seven might enter the block at the same time. The trains ran at irregular intervals and not in accordance with any time-table. The evidence was that an average of two or three trains passed in each direction during each hour with a maximum of five or six. On the gang starting work on the morning of November 12, 1953, Cade, on the instructions of Winfield, went track walking, which involved examining the track for any defects, putting in keys, tightening bolts and generally dealing with anything that went wrong. He went alone without a look-out man, carrying only a hammer. If he found a fishplate bolt loose it would be his duty to get a spanner to tighten it. If he found only one bolt loose he would go on with his inspection until he came to a lengthman's cabin, but if he found both bolts in a fishplate loose he would go at once to the nearest cabin for a spanner. The type of spanner was heavy with a handle three feet long. (Winfield and another witness, Miller, stated that the work was simple and did not require much attention. Winfield stated that it was possible to place the spanner on the nut and then to turn it while glancing along the track and keeping a look-out for traffic.) Later Winfield met Cade at a lengthman's hut. Cade was carrying a spanner and said: "I am going back to tighten a nut "at Settings Dyke Bridge." A few minutes afterwards two trains passed each other near Settings Dyke Bridge travelling in opposite directions at speeds of 20 and 15 miles per hour. The engine of each of these trains was proceeding tender first. One drew 16 wagons and the other 50. When the train on the up-line had passed about half the other train, the driver of the up-line train saw Cade swaying from side to side in the six-foot way between the tracks and about level with the middle of the tender in front of that driver's engine. Eventually Cade was found lying diagonally across the six-foot way, having been severely injured by being struck by one of the trains, and on the same day he died from his injuries. These injuries were in the left part of his head and were inflicted most probably by the tender of the engine being driven on the up-line. Near where he was found on the six-foot way side of the up-line there was a fishplate both the bolts of which were loose. The accident occurred at about 8.15 a.m. when visibility was good. It was possible to see a train for a quarter of a mile in either direction from the point of the accident, which occurred on a curve of the line on a radius of 20 chains.

The appellant, by her statement of claim and at the trial, alleged that the deceased was killed by reason of a breach by the respondents of rule 9 of the Prevention of Accidents Rules, 1902. The appellant made further allegations of negligence which were now no longer material.

F. W. Beney Q.C. and *Sir Christopher Cowan* (*Felix Denny* with them) for the appellant. On the true construction of rule 9 the danger to be considered is the danger of a man being struck by a passing train; the likelihood or otherwise of his being able to avoid this danger is irrelevant. It is the likelihood of the danger arising that is relevant. There has been a confusion between the two likelihoods.

Two points arise, (1) the proper construction of rule 9, and (2) its application to the present facts. The Court of Appeal was wrong on both points.

Hutchinson v. *London & North Eastern Railway Co.*[1] is relied on as showing that the point is the likelihood of danger arising. The test is not whether a reasonably prudent man could avoid it if it did arise. The fact that the deceased was an experienced and skilful man likely to keep a good look-out is irrelevant and is not a factor to be taken into account. If it was, the duty would only arise in the case of inexperienced and unskilful men. In any event, the trial judge and the Court of Appeal gave too much weight to that circumstance. In the circumstances of such a case as this a look-out should have been provided. " Likely " in this rule means " probable." There is no distinction between work in which " danger is likely to arise " and work which is likely to be dangerous.

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[1] [1942] 1 K.B. 481, 482, 483–484, 490; 58 T.L.R. 174; [1942] 1 All E.R. 330.

Other relevant cases are *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*[2]; *Carey* v. *Ocean Coal Co. Ltd.*[3]; *Smithwick* v. *National Coal Board*[4]; *Vincent* v. *Southern Railway Co.*[5] and *Ferguson* v. *North British Railway Co.*[6] The question to be asked is whether the work is likely to involve contact with a train. If it does, danger is likely to arise. The " danger " contemplated by rule 9 is that of trains or engines approaching men working on or near the lines. The rule refers to " all cases " and " any " danger."

The deceased was engaged on work of repair within the meaning of the rule: see *Reilly* v. *British Transport Commission.*[7] *Berriman* v. *London & North Eastern Railway Co.*[8] is distinguishable.

Sir Christopher Cowan following. In considering whether danger is likely to arise, one must take into account time, place and circumstances. Here there is no evidence whether anyone was informed that trains were likely to be coming. The fact that the accident did occur shows that danger was present at some time or another. It would have involved no great difficulty to send out two men on this job, and that would certainly have reduced the element of danger.

Marven Everett Q.C., *George Waller Q.C.* and *Alastair Sharp* for the respondents. " Repairing " in rule 9 does not include maintenance. The point of the protection prescribed by rule 9 is that men engaged on repairs will be concentrated on their work for considerable periods of time: see *Berriman's* case.[9] Here danger was not " likely to arise " within the meaning of rule 9 to a lengthman tightening or about to tighten a loose bolt in conditions of good visibility with an average of two or three goods trains an hour passing in each direction. A man tightening or about to tighten such a bolt as this was not repairing the permanent way. Even if tightening the bolt was " repair," the deceased never reached the point of repairing, because the evidence goes no further than to show that he was bending over in order to begin to tighten it. The words " for the purpose of " relaying or repairing " in rule 9 must be construed in accordance with the words of article 12 of the Schedule to the Railway

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[2] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

[3] [1938] 1 K.B. 365; 54 T.L.R. 40; [1937] 4 All E.R. 219.

[4] [1950] 2 K.B. 335; 66 T.L.R. (Pt. 2) 173.

[5] [1927] A.C. 430.

[6] 1915 S.C. 566.

[7] [1957] 1 W.L.R. 76; [1956] 3 All E.R. 857.

[8] [1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255.

[9] [1946] A.C. 278, 308.

Employment (Prevention of Accidents) Act, 1900: "Protection "of permanent way men when relaying or repairing permanent "way." The power to make rules given by section 1 (1) of the Act is "with respect to any of the subjects mentioned in the "Schedule." This construction is in accordance with *Judson* v. *British Transport Commission.*[10] Reliance is placed on *Sumner* v. *R. L. Priestley Ltd.*[11] *Ferguson* v. *North British Railway Co.*[12] and *Vincent* v. *Southern Railway Co.*[13] are of high persuasive authority.

In *Hutchinson's* case[14] the decision was right, but certain dicta were not well founded. On its wording, rule 9 is dealing with danger and it describes what the danger is, "any train or "engine approaching such men so working." When there are no trains, there is no danger. It is a question of fact in each case. One must consider the man with his experience and his knowledge and the frequency and speed of the traffic. Contrast *John Summers & Sons Ltd.* v. *Frost.*[15] See also *Smithwick's* case.[16]

As to the word "likely," it is defined in Webster's Dictionary, 1913 and 1928 editions, as "of such a nature or so circumstanced "as to render something probable" and "in all probability, "probably." There is a contrast between "probable" and "possible." One cannot exclude from the practical application of rule 9 the probability of the persons concerned taking reasonable steps to avoid the danger.

One does not assume that the lengthman will act with supreme care, because then there could never be an accident. But one must approach the matter on the assumption that one is dealing with railway risks for railway men. In considering the dangers one must bear in mind the class of men with whom one is dealing.

The danger is the danger of injury or death by being run down by a train. There is no point in legislating for danger in the abstract. The rules are legislating against the consequences of this particular danger. Where trains approach men working one must consider when danger is likely to arise therefrom and when it is not likely. In considering this, one must refer to all the surrounding circumstances, including the probability of the

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[10] [1954] 1 W.L.R. 385; [1954] 1 All E.R. 624.

[11] [1955] 1 W.L.R. 1202; [1955] 3 All E.R. 445.

[12] 1915 S.C. 566.

[13] [1927] A.C. 430.

[14] [1942] 1 K.B. 481.

[15] [1955] A.C. 740, 766; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870.

[16] [1950] 2 K.B. 335.

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avoidance of the danger by the men. The observations in *Hutchinson's* case,[17] relied on for the appellant, were dealing with a time when there were no trains.

As to repair, the question arises: When the man was knocked down was he repairing the permanent way? When is a man repairing it? When he gets within 10 or five yards of the defect? Here he was not in the act of repairing it. On the true construction of rule 9 there is a difference between " repair " and servicing or maintenance: see the definitions of " maintain " and " repair " in Webster's Dictionary. The former is to hold or keep in a particular state or condition; the latter is the act of restoration. Putting in a fresh rail or building up the ballast under a sleeper are repair and require concentration, so that the men cannot keep a look-out for themselves. In such circumstances danger arises from a passing train. But putting up the pressure in a car tyre is not repair; it is putting into condition something which has become temporarily out of condition: see *Inglis* v. *John Buttery & Co.*,[18] *Greg* v. *Planque* [19] and *Berriman's* case.[20] There are great difficulties in treating " maintenance " and " repair " as interchangeable terms. The nuts are tightened to forestall a state of affairs when repair would be necessary. The object of rule 9 is to protect men who, because of what they are doing, cannot protect themselves; so " repairing " in it means more than a lengthman's task. Section 151 (1) (vi) of the Factory Act, 1937, refers to repairs of different sorts: see *Griffin* v. *London Transport Executive*.[21] What was done here was a minor adjustment and not a repair. In *Reilly's* case [22] the facts were substantially different from those of the present case. The smallest defect in the points might cause a derailment, but that is not the case with a fishplate nut; that may be the justification for that decision. In the whole context of rule 9 " repairing " must mean something more than minor adjustments. Repair involves replacement of something which is decayed or broken.

George Waller Q.C. following. As to the question whether any danger is likely to arise, the danger contemplated is danger to men working on the lines from trains approaching, the danger of being injured by such trains. Unless a man is doing something suicidal he will only remain on the line if he is unaware, until it is too late, of an approaching train. The factors which might make a man unaware of approaching trains are, for instance, limited visibility, weather conditions, the speed and frequency of the trains, his own conduct and the work he was doing. If he is performing a simple task he can look out for himself just as well as another man specially appointed for the purpose. In deciding whether danger is likely to arise, a factor is the likelihood of the man not looking out for himself. The more absorbing his task, the greater the likelihood of his not keeping a look-out. In *Hutchinson's* case [23] the task was far more elaborate than here; it was also on a main line. Here the task was so simple that the man could look out the whole time he was doing it for approaching traffic. This was not a case where danger was likely to arise.

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[17] [1942] 1 K.B. 481.

[18] (1878) 3 App.Cas. 552, 565, 573.

[19] [1936] 1 K.B. 669.

[20] [1946] A.C. 278, 283, 290, 294.

[21] [1950] 1 All E.R. 716, 717.

[22] [1957] 1 W.L.R. 76.

[VISCOUNT KILMUIR L.C. intimated that their Lordships required to hear argument in reply only on the question whether danger was likely to arise and not on the question of repair.]

F. W. Beney Q.C. in reply. It is " any danger " which has to be considered where the possibility is a likelihood. The danger is the risk of something happening which may turn out to be an accident. The question is whether on the facts of the case the danger was likely to arise. The time when this has to be considered is when the man is sent off on his tour of inspection. The danger must be considered apart from the means which may be taken to avoid it by the man himself or by others. One cannot weigh up the potential which the man may have had for avoiding the danger. The right approach is to consider the proximity of the man to the track. The methods of avoiding the danger are quite a different question.

It may be that some blame attached to the deceased who was under a duty to keep a look-out, and that therefore the blame should be apportioned.

Their Lordships took time for consideration.

VISCOUNT KILMUIR L.C. My Lords, this is an appeal from an order of the Court of Appeal in England (Hodson, Parker and Ormerod L.JJ.), which affirmed a judgment of Barry J. in favour of the respondents.

The appeal raises the question of the meaning of certain words of rule 9 of the Prevention of Accidents Rules, 1902 (S.R. & O., 1902, No. 616), made by the Board of Trade pursuant to section 1 (1) of the Railway Employment (Prevention of Accidents) Act, 1900.

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[23] [1942] 1 K.B. 481.

[His Lordship stated the facts and continued:] The two questions raised were: 1. Whether the work which the deceased was doing was a case where any danger was likely to arise? 2. Whether a lengthman about to tighten or engaged in tightening a loose bolt in a fishplate is a man working for the purpose of repairing the permanent way?

Although the second point, having been decided by Barry J. and the Court of Appeal in favour of the appellant, was in this House raised later in the argument, I deal with it first.

It was submitted that, if tightening a nut is "repair," the deceased was not working for the purpose of repair, since the evidence did not prove more than that he was bending over in order to commence the tightening. It is unnecessary to say more about this argument, save that I do not accept it; nor is it necessary to deal in detail with the case of *Judson* v. *British Transport Commission*[1] as the facts were very different, but I should wish to hear full argument on the scope and extent of the words "for the purpose of relaying or repairing" before being taken to agree with all the observations in the Court of Appeal on this point.

Secondly, reliance was placed on the reasoning in *Berriman* v. *London & North Eastern Railway Co.*,[2] in which the construction of this rule came before your Lordships' House. The deceased in that case was engaged in oiling the connecting rods and other apparatus by which the points were worked from the signal box. We were reminded that the majority of the House differed from the view of the Court of Appeal that repair means or includes maintenance. It is worth noting that before us it was conceded that the two were not mutually exclusive. The majority in *Berriman's* case did not, however, stop there. They went on to say that the word "repair" must be given its ordinary meaning, which was unaffected by the context of rule 9, or the fact that the work in question was on a railway line. That being the approach, I observe that Lord Macmillan said[3]: "Relaying is the major operation of renewing what is so defective "as to be past repair; repairing is the minor operation of making "good remediable defects." Lord Porter used the words[4]: "The

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[1] [1954] 1 W.L.R. 585; [1954] 1 All E.R. 624.

[2] [1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255.

[3] [1946] A.C. 278, 294.

[4] Ibid. 307.

"exact meaning of repair is perhaps not easy to define, but it "contains, I think, some suggestion of putting right that which "has gone wrong." While my noble and learned friend, Lord Simonds, put it thus[5]: "I do not doubt that apart from obsolete "usage its meaning in the transitive sense is that which I find "in the first dictionary that comes to my hand, 'to restore to "'good condition by renewal or replacement of decayed or "'damaged parts or by refixing of what has given way: to "'mend.'"

Applying this conception that "repair" involves putting right that which has gone wrong, I believe that tightening a nut which has come loose is within it. It is, indeed, viewed as a virtually conceded point in the speech of Lord Jowitt, who with Lord Wright constituted the minority in that case. Moreover, I agree with the decision and the reasoning of Donovan J. in *Reilly* v. *British Transport Comission.*[6] This view is buttressed in the present case by the rule, which the deceased was obeying, that, when he found that two nuts had worked loose, he had immediately to get a spanner and tighten them. I am therefore of opinion that the respondents fail on the second point.

I now turn to the construction of the words "in all cases "where any danger is likely to arise."

It was agreed before your Lordships that the "danger" to which the rule is directed is danger from trains or engines approaching men, or (as in the present case) a single man, working on or near the railway lines.

If that is the nature of the "danger" of the risk of injury to the men or man, what, then, is the extent of the commission's obligation? That is the vital question and Mr. Beney rightly emphasised the use of the phrases "in *all* cases" and "any "danger." Giving due emphasis to these phrases, the question which must be asked in every case when men or a man are or is so working, or rather (for the question must be asked and answered in time) going to work, on or near the railway lines is: "Will any risk of injury to them or him be likely to arise from "approaching trains or engines?" Whenever that question is answered properly in the affirmative, then and only then must a look-out man be provided.

If that is a correct expression of the nature of the commission's obligation two consequences seem to me to flow necessarily from it. The first is that the duty of the British Transport Commission is not an unqualified or absolute duty like the duty which might arise, for example, under the Factory Acts legislation. As observed by Lord Greene M.R. in the case of *Hutchinson* v. *London & North Eastern Railway Co.*,[7] the vital words "any "danger is like to arise" mean what they say and must be given their ordinary meaning. They import, inevitably, an estimate of likelihood; not of what might possibly be foreseen, but of what should be expected to occur. The estimate must be made according to ordinary principles of common sense and experience. Therefore, the estimate must be made in the light of all relevant circumstances known at the material time, including the amount and speed of traffic on the line, the visibility allowed by gradients and bends and weather conditions, the nature of the work to be done and also the skill and experience of the men or man about to do it.

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[5] [1946] A.C. 278, 314.

[6] [1957] 1 W.L.R. 76; [1956] 3 All E.R. 857.

Mr. Beney argued that such skill or experience was not a relevant factor or, alternatively, that the judge and the Court of Appeal had given it an inadmissible weight. I do not accept either of these submissions. Though, no doubt, some allowance has to be made for temporary inadvertence and distraction, a fair judgment must make some assumption as to the behaviour of the men or man engaged: and the assumption will, plainly, vary widely with the experience and skill of the individual concerned; this is the second consequence I had in mind. If it were otherwise, and if the estimates must be made on the assumption of maximum foreseeable inadvertence, then the obligation to provide a look-out will arise in every case except those of traffic conditions of an extremely limited character. If that had been the intention of the rule-making authority I cannot think that the rule would have been drawn in its existing form. It would have been a simple matter to impose an obligation always to provide a look-out for men working on or near the lines except only in cases in which, having regard to the small amount or other conditions of traffic, no such look-out should be regarded as reasonably necessary.

It has been of the essence of Mr. Beney's case that in the present case (as in every other like case where an experienced man, himself a sub-ganger, was deputed to do a job of inspection of the line which would occupy half a day) the only proper answer to the essential question, which must have been asked at the beginning of the day, was that a look-out should be provided. In other words, that because of the possibility of tightening operations in regard to the bolts, and the possibility of distraction during the performance of that task, some danger was likely to arise. In my judgment, that is not the fair meaning of the words of the rule. It confuses what is possible with what is likely. It must be remembered that in *Hutchinson's* case [7] it was not disputed that there was any danger in the work that the men were carrying out. All that was said was that the danger was not an exceptional danger (see *per* Lord Greene [8]). It will be noted that Goddard L.J. says [9]: " . . . there is no ground for saying that that rule is " to be construed as meaning any unlikely danger. The words " are 'Where any danger is likely to arise.' An abnormal or " unusual danger is not 'likely to arise.' It is difficult to fore- " see. There is no reason for giving to those words any other " than their plain, natural meaning."

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[7] [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 330.

As in my view there is in this case no breach of the rule, it is unnecessary for me to consider the observations in that case on what is necessary to constitute contributory negligence.

I see nothing in the ratio decidendi of *Hutchinson's* case [10] contrary to my own conclusion, that the answer in every case must be a matter of degree and therefore of fact. In the present case, the view taken by Mr. Winfield, the responsible officer of the commission, was, as I read his evidence, that in the circumstances no danger was likely to arise. Barry J., who felt sympathy for the plaintiff but who heard the witnesses, came to a like conclusion of fact, and I do not think that he was guilty of misdirection. The three judges of the Court of Appeal confirmed the conclusion of Barry J. I think that this House should be very slow to disturb such unanimity of opinion upon a question of degree and fact. Moreover, I share their opinion and would dismiss the appeal.

LORD MORTON OF HENRYTON. My Lords, rule 9 of the Prevention of Accidents Rules, 1902 (S.R. & O. 1902, No. 616) has already been read, and the relevant facts have already been stated by the Lord Chancellor.

The first question arising upon this appeal is whether the deceased man, Cade, was " working for the purpose of repairing " the permanent way " at the relevant time. It was submitted by counsel for the respondents that the tightening of a nut or a

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[7] [1942] 1 K.B. 481.

[8] Ibid. 484.

[9] Ibid. 488.

[10] [1942] 1 K.B. 481.

Lord Morton of Henryton.

bolt is in no case a work of repair, but is a work of maintenance which is performed in order to prevent the need for repair. They further contended that if the work in question was a work of repair, the deceased man was not doing that work at the time of the accident.

My Lords, as to the former argument, this House, in the case of *Berriman* v. *London & North Eastern Railway Co.*,[11] decided that men engaged in oiling and possibly also cleaning the mechanism connecting the signal cabin and the points or signals on the running lines of a railway were not engaged in work of repair. In my view, however, it is clear from the speeches in that case that if the work in question had been the tightening of bolts which were loose, the decision would have been the other way. For instance, Lord Porter said [12]: "I cannot think that the "ordinary man, if asked whether the deceased man was engaged "in repairing the permanent way when he was brushing down "and oiling the signal wires and point rods, would say that he "was. The exact meaning of 'repair' is perhaps not easy to "define, but it contains, I think, some suggestion of putting "right that which has gone wrong. It does not include the "mere keeping in order by oiling, brushing or cleaning something, "which is otherwise in perfect repair and only requires attention "to prevent the possibility of its going wrong in the future." The precise point arising in the present case was dealt with by Donovan J. in the case of *Reilly* v. *British Transport Commission*,[13] and that learned judge said: "The function of crossing "bolts and nose bolts is to hold tightly together the component "parts of the points at that spot. If by working loose they do "not do this, then the bolts cease to perform their full duty "even though they have worked loose only a little. For their "function is not to work loose at all. Accordingly, when the "bolts are tightened up again the result is that something which "has not been doing its full duty before is now restored to full "duty. I see no difficulty in describing an operation which has "that effect as a repair. Looked at in another way, a crossing "bolt or nose bolt which is loose is a defective unit, even though "it is only a little loose, for it should be tight, and if the defect "is not made good, it may become more pronounced, and serious "results, for example, a derailment of a train, might ensue. To "put right such a defect is, I think, reasonably and properly "called a repair." I entirely agree with these observations.

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[11] [1946] A.C. 278.
[12] Ibid. 307.
[13] [1957] 1 W.L.R. 76, 79.

The latter of the two arguments already mentioned must also be rejected. The learned trial judge, Barry J., took the view on the evidence that at the time when Cade was struck he was bending over to tighten one or other of the nuts by hand and, in my opinion, he was fully justified in so finding. It is, therefore, unnecessary to consider whether or not Cade was " working " on the line " for the purpose of . . . repairing the permanent way " from the time when he set out along the line to do the work allotted to him by the ganger Winfield. I incline to think that he was. I quote the following three questions and answers from Winfield's evidence: " Q. What happened then after you had got " to that hut and, so to speak, signed on?—A. Well, we all, the " gang, set off to work after I told Cade that he would go track- " walking. Q. What does that involve?—A. It involves examining " the track. Q. For what purpose?—A. For any defects, or " putting in keys, tightening up bolts or anything that has gone " wrong."

The present case is, I think, distinguishable from the case of *Judson* v. *British Transport Commission*,[14] since the plaintiff in *Judson's* case [14] was not walking along the line for the purpose of putting right anything that was wrong, but merely for the purpose of deciding what lengths of line would be required for the repairing and relaying of the line on a later day. I think, however, that some of the observations of the Court of Appeal as to the scope and extent of the words " for the purpose of relaying or " repairing " may require consideration on some future occasion.

The next question arising in the present case is whether any danger was " likely to arise," within the meaning of rule 9, either when Cade set out upon his morning's work or when he set out to tighten the loose nuts, after meeting the ganger Winfield at the lengthman's hut. These seem to me to be the only times at which the duty of providing a look-out man could possibly arise. I think that the latter time, as well as the former, is material to be considered; it would, no doubt, have been possible for the ganger to say to Cade: " Wait here until I get a look-out man " to accompany you," and to return to where the other three men were working and to detail one of them to accompany Cade as a look-out.

In my opinion, however, no danger was " likely to arise," within the meaning of the rule, at either of these times. It was certainly possible that danger might arise, but that is not the test to apply in considering whether or not the respondents were in breach of rule 9. The rule is made "with the object of protecting "men working . . . on or near lines of railway in use for traffic "for the purpose of relaying or repairing the permanent way of "such lines . . . in all cases where any danger is likely to arise." Plainly it is always possible that danger may arise to men so working, but the obligation under the rule is limited to cases where danger is likely to arise; so it is clearly contemplated that there may be cases in which danger is unlikely to arise, even when men are working on or near lines of railway in use for traffic for the purpose mentioned in the rule. In considering whether danger was or was not "likely to arise" in the present case, it is, in my view, proper to take into consideration such factors as—

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[14] [1954] 1 W.L.R. 585.

(a) The site of the accident.—The accident occurred upon a curve of a line on a radius of 20 chains, and Winfield gave evidence that the lines were in view for a quarter of a mile in both directions from the point where the accident occurred.

(b) The amount and speed of traffic upon the lines.—The lines, although technically known as a main line, were used for goods traffic only. Winfield and the assistant district operating superintendent employed by the respondents both said that the trains travelled at irregular intervals and not in accordance with any time-table, but at an average of about two to three per hour in each direction. Winfield stated that the speed of one of the two trains involved in the accident was 20 miles per hour, and it was stated by witnesses called by the respondents (whose evidence was not challenged in this respect) that the speed of the other train was about 15 miles per hour.

(c) The nature of the work.—Winfield and another witness, Miller, stated that the work was simple and did not require much attention. Winfield stated that it was possible to place the spanner on the nut and then to turn it while glancing along the track and while keeping a look-out for traffic.

(d) The experience of the deceased.—It was proved and accepted by the appellant, that the deceased was a qualified look-out man and that he was familiar with the rules contained in the British Railways' Rule Book; and Winfield stated that the deceased had been a member of his gang for about four years, that he was familiar with this length of line, and that he had been appointed a sub-ganger in October, 1953.

(e) Winfield stated that visibility was good on the morning in question.

These being the relevant circumstances, I agree with the learned judge and the Court of Appeal that in the present case danger was unlikely to arise, and that there was no breach of rule 9.

I should add that counsel for the appellant contended that it was not right to take into account the fact that the deceased man was an experienced man who was likely to keep a good look-out, and they relied upon certain observations of Lord Greene M.R. and Goddard L.J. in *Hutchinson* v. *London & North Eastern Railway Co.*[15] On this aspect of the matter I cannot usefully add anything to the view expressed by the Lord Chancellor, with which I respectfully agree.

I agree that this appeal should be dismissed.

LORD COHEN. My Lords, I have had an opportunity of reading in print the speech which has been delivered by the noble and learned Lord Chancellor.

I am in complete agreement with his statement of the law applicable to the case. I accept that the duty of the respondents is not an unqualified or absolute duty, and that the words " any " danger is likely to arise " import an estimate of likelihood; not of what might possibly be foreseen, but of what should be expected to occur. I agree also with his statement that the estimate must be made in the light of all relevant circumstances known at the time. I have, however, the misfortune to differ from him as to the proper conclusion to be drawn from those circumstances in the present case. Since the rest of your Lordships, as well as the learned judges in the courts below, agree with the estimate drawn by the noble and learned Lord Chancellor, I can have no great confidence in my conclusion, and I shall not detain your Lordships long in giving my reasons for my view of the facts.

In my opinion, on the facts as found by the learned trial judge and summarised by the noble and learned Lord Chancellor, it was likely that two trains would from time to time be passing one another at the point where this accident happened, that on some occasion when this occurred a ganger might be engaged in tightening loose bolts of a fishplate, and that if he were so engaged his attention might be distracted to such an extent that he would fail to observe an approaching train. That being so, it seems to me to be irrelevant that the concurrence of those factors might not often occur, and I should have held that this was a case where danger was likely to arise. For those reasons I would have allowed the appeal.

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[15] [1942] 1 K.B. 481.

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Lord Evershed. My Lords, I agree with the opinion of my noble and learned friend on the Woolsack, and have nothing to add to it.

Lord Birkett. My Lords, I agree with the opinion of my noble and learned friend on the Woolsack. It covers so completely anything I might wish to have said that I do not desire to deliver an opinion of my own.

Appeal dismissed.

Solicitors: *Smith & Hudson for Williamson, Stephenson & Hepton, Hull; M. H. B. Gilmour.*

F. C.

J. C.*
1959
April 7.

ELEANOR JESSIE DUN . . . . Appellant;

AND

FRANCIS BOYCE DUN and Another . . Respondents.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (New South Wales)—Family provision—Facts to be considered as existing at date of testator's death, not as at hearing of application—Account to be taken of events which testator might reasonably be expected to foresee—Testator's Family Maintenance and Guardianship of Infants Act, 1916–54 *(N.S.W.), s.* 3 (1).

Family Provision—Australia (N.S.W.).

Judicial Precedent—Decision long undisturbed—Subsequent legislation—Construction of statute—Statute re-enacted in same terms—Statute merely left unamended.

By section 3 of the Testator's Family Maintenance and Guardianship of Infants Act, 1916–54, of New South Wales: "(1) If "any person . . . disposes of . . . his property . . . by will in such a "manner that the widow, husband, or children of such person . . . "are left without adequate provision for their maintenance . . . , "the court may at its discretion, and taking into consideration "all the circumstances of the case, . . . order that such provision "for such maintenance . . . as the court thinks fit shall be made "out of the estate of the testator for such wife, husband, or "children . . ."

On an application under the above subsection by or on behalf of a dependant of a testator the court, in deciding on the adequacy

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* *Present*: Viscount Simonds, Lord Cohen, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning.

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DUN *v.* DUN.

of the provision, should have regard to the facts as they existed at the date of the testator's death and not as they existed at the date of the application. In so doing the court should take into account not only events which had already occurred, but also such happenings as the testator might reasonably be expected to foresee immediately before he died.

The appellant's husband, who died in 1942, by his will, made in 1939, left her certain household and personal effects and pecuniary legacies aggregating £A2,000, and also an annuity of £A600 which, by a codicil made in 1942, was increased to £A800 tax free. At the time of his death the testator's estate was valued at £A22,216, but by 1955 it had increased to £A82,000, while the appellant's financial position had deteriorated. In those circumstances the appellant, having been granted an extension of time for that purpose, applied under section 3 (1) of the Act for further provision to be made for her:—

Held, that the material date in determining whether the appellant was left without adequate provision was the date of the testator's death; that if the facts as at that date were the only things relevant, the provision he made for her was not inadequate; that he did take into account what he thought might be the effect of the war by increasing the annuity in 1942, but that it could not be said that he ought to have foreseen the actual result of the war and post-war conditions, and accordingly the appellant's application had been rightly dismissed.

Coates v. *National Trustees, Executors and Agency Co. Ltd.* (1956) 95 C.L.R. 494 applied.

In re R. A. Forsaith (1926) 26 N.S.W.S.R. 613 overruled.

Bosch v. *Perpetual Trustee Co.* [1938] A.C. 463; 54 T.L.R. 467; [1938] 2 All E.R. 14 considered.

Dictum of Denning L.J. in relation to stare decisis in *Royal Crown Derby Porcelain Co. Ltd.* v. *Russell* [1949] 2 K.B. 417 at 429; [1949] 1 All E.R. 749 applied.

Order of the High Court of Australia affirmed.

APPEAL (No. 41 of 1958), by special leave, from an order of the High Court of Australia (Dixon C.J., Kitto and Taylor JJ., McTiernan and Williams JJ. dissenting) (December 19, 1957) reversing an order of the Supreme Court of New South Wales in Equity (August 30, 1956) granting an application by the present appellant under section 3 (1) of the Testator's Family Maintenance and Guardianship of Infants Act, 1916–54, of New South Wales for maintenance out of the estate of her deceased husband. The respondents were the husband's executors.

The question arising in this appeal was whether the issue whether an order should be made in the court's discretion should be determined on the facts as they existed at the date of the application or on the facts as they existed at the date of the testator's death.

The appellant was the widow of Thomas Fitzgerald Dun, who died in Sydney on September 10, 1942. By his will, made in 1939, he gave her certain personal effects and pecuniary legacies aggregating £A2,000 and an annuity of £A600 which, by a codicil made in 1942, he increased to £A800 tax free. At the date of his death the value of his estate was about £A22,000. The importance of the relevance of the date for determining the application was that between the date of his death in 1942 and the date of the hearing of the application in 1956, owing to a large rise in the price of wool, a small grazing property, part of his estate, had so increased in value that on its sale by the executors the value of the estate increased to about £A82,000.

The trial judge (Roper C.J. in Equity), basing himself on *In re R. A. Forsaith*,[1] held that the time at which the existing circumstances should be considered was the date on which the court heard the application, and in addition to the provisions made for the appellant in the will and codicil he granted her a legacy of £A5,000 and an annuity of £A1,500 in lieu of the tax free annuity of £A800.

On appeal by the respondents the High Court of Australia, following *Coates* v. *National Trustees, Executors and Agency Co. Ltd.*[2] which, unknown to the trial judge in the present case, had overruled *In re R. A. Forsaith*,[3] held that the material time in deciding whether the court had a discretion to vary the will was the date of the testator's death, and they allowed the respondents' appeal and dismissed the application. The widow appealed.

1959. Feb. 18, 19. *Gordon Wallace Q.C.* (Australia) and *Anthony Cripps Q.C.* for the appellant. The matter relates to the true construction and the proper method of administering the Testator's Family Maintenance and Guardianship of Infants Act, 1916–54, of New South Wales, which for relevant purposes was amended in 1938 and 1954. The Act, which has the same general objective as the English Act of 1938, also appears in other states of Australia and in New Zealand. The New South Wales Act and the South Australian Act are for relevant purposes the same, but, as is submitted, the Acts of Tasmania,

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[1] (1926) 26 N.S.W.S.R. 613.

[2] (1956) 95 C.L.R. 494.

[3] 26 N.S.W.S.R. 613.

Victoria and Queensland are appreciably different. The first point is whether the correct time for the court to apply when considering whether in its discretion the applicant widow or children should receive an order is the date of the hearing or the date of the death of the testator—whether the issue should be determined on the facts as they existed at the date of the application or on the facts as they existed at the date of the testator's death. There was a division of opinion on the matter in the High Court, McTiernan and Williams JJ. expressing in clear terms that the date of hearing is the proper time, while Dixon C.J., Kitto and Taylor JJ. held that the date of death is the time, and that the court can take into consideration reasonably foreseeable contingencies, i.e., matters which the testator might reasonably have foreseen.

Harvey C.J. in Equity, in *In re R. A. Forsaith*,[4] held that on the true construction of the Act, having regard to its retroactive operation, the proper time to consider all matters relating to his jurisdiction and discretion was the date of the hearing. That decision has been followed in the courts of New South Wales for 30 years. *In re A. L. Pichon*,[5] decided in 1946, expressly followed it. The same principle was also adopted in South Australia where, for all practical purposes, the Act is the same as the New South Wales Act: *In re Gerloff*[6]; *In re Wheare*.[7] In the present case Roper C.J. in Equity, feeling himself bound by *In re R. A. Forsaith*,[8] and in the light of the great change in value of the estate, and in the further light of the great decrease in the value of money in New South Wales and the increase in the cost of living, made the order he did. A few days before he made his order, however, and unknown to him, the High Court of Australia, in *Coates* v. *National Trustees Executors and Agency Co. Ltd.*,[9] which related to the corresponding Victorian Act, held by a majority that the issue was to be determined according to the circumstances existing at the date of the testator's death. When the present case was appealed to the High Court they felt themselves bound by *Coates's* case.[9]

The natural effect of the use of the present tense in section 3 (1) of the New South Wales Act is to bring the matter up to the date when the court is reading the section. The Victorian section—section 139—is appreciably and importantly different; it is directed solely to what the will does; it is not retroactive, and it is more natural to peg it down to the date of the will taking effect. The Tasmanian and Queensland Acts are much the same as the Victorian Act. The present tense in section 3 (2) of the original New South Wales Act—" The court may attach such " conditions to the order as it thinks fit, or may refuse to make " an order in favour of any person whose character or conduct " is such as to disentitle him to the benefit of such an order "—clearly refers to the time of the hearing, and indicates that the conduct of the applicant between the date of the death of the testator and that of the hearing is relevant for the judge to consider. If there may be two applications the position as regards date is even clearer. That can only be because the applicant's circumstances have deteriorated or the size of the estate has appreciated. The court is given jurisdiction because of those reasons; its jurisdiction is to consider the applicant's position at the time of the second application.

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[4] 26 N.S.W.S.R. 613.

[5] (1946) 47 N.S.W.S.R. 186.

[6] [1941] S.A.S.R. 156.

[7] [1950] S.A.S.R. 61.

[8] 26 N.S.W.S.R. 613.

[9] 95 C.L.R. 494.

The age of the decision of *In re R. A. Forsaith*[10] is sufficient to attract the doctrine of stare decisis. With the exception of Fullagar J. in *Coates's* case[11] and Williams J. in the present case the message to be gathered from *Bosch* v. *Perpetual Trustee Co.*[12] has been misunderstood. The judgment in the *Bosch* case all goes to the principle on which the discretion is to be exercised. One must look at a case in the light of its particular facts, and in the *Bosch* case there was no issue, no suggestion, of any change in the circumstances between the death and the hearing. In *Leeder* v. *Ellis*[13] this Board seemed to think that the attempt to let in fresh evidence as to what had happened after the testator's death was all right in itself. That seems to have been assumed.

The wording of the English Act of 1938 is different from that of the New South Wales Act, so the English decisions, if they be so construed as helpful, are, it is submitted, distinguishable: *In re Borthwick*[14]; *In re Borthwick, decd.*[15]; *In re Franks.*[16] But even under the English Act one finds Lord Greene M.R., Asquith L.J. and Wynn-Parry J. expressing views which, it is submitted, support the proposition advocated for the appellant here. Alternatively, if the Board take what may be called the

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[10] 26 N.S.W.S.R. 613.

[11] 95 C.L.R. 494.

[12] [1938] A.C. 463; 54 T.L.R. 467; [1938] 2 All E.R. 14.

[13] [1953] A.C. 52, 65, 67; [1952] 2 All E.R. 814.

[14] [1948] Ch. 645, 651; 64 T.L.R. 471; [1948] 2 All E.R. 635.

[15] [1949] Ch. 395, 400; [1949] 1 All E.R. 472.

[16] [1948] Ch. 62, 66; 63 T.L.R. 583; [1947] 2 All E.R. 638.

Coates doctrine,[17] namely, that one must take into consideration matters which should have been reasonably foreseeable by the testator at the date of his death, he did not foresee the economic changes—increase in the cost of living and in income tax; he should have given her the whole of his income.

Anthony Cripps Q.C. following, referred to the differences in the various Acts and said that a comparison of them did not really lead to any helpful construction.

K. S. Jacobs Q.C. and *D. E. Horton* (both of Australia) for the respondents. On construction and in the light of the general scheme of the Act itself there is undoubtedly in the Act no right in the widow or a child to make more than one application. Once the order is made it can never be increased under the original Act at the instance of the applicant. It can be reduced, but not increased: in *In re Denis Molloy* [18] it was held that an application to rescind or alter an order did not authorise any increase under the original order; and see *In re Porteous, decd.*[19] Section 6 (4) of the New South Wales Act does not, it is submitted, operate for the benefit of an applicant, but for the benefit of the other persons interested on the estate. Once an order had been made within time a widow could not apply again; the statutory right was exhausted. So, it is submitted, it would be illogical, if one looks at the general framework of the statute, that a person could gain an advantage from a procedural change made in 1954—the provision granting an extension of time in which to apply under section 3 (1). It would be a strange circumstance if an applicant could, by not making the application within the time prescribed by the Act, obtain an advantage which was not available if the application had been so made. That lends support to the view that the proper time is at the time of death, when the rights accrue. To say that the date of hearing is the proper date for determining jurisdiction is to say that no right need exist when one commences proceedings; it would be sufficient to point to something which had happened between the commencement of proceedings and the hearing to enable relief to be granted to the applicant. So the applicant would not necessarily know whether he had any initial rights to invoke the jurisdiction until the matter was actually heard. That would be a most unusual situation. It is clear on the framework of the Act that the legislature regarded the date of the death as the date when rights accrued—when the right to claim the benefit arose.

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[17] 95 C.L.R. 494.

[18] (1926) 28 N.S.W.S.R. 546.

[19] [1949] V.L.R. 383.

If a widow could base her jurisdiction to make the application on events which happened many years later, then her right to obtain anything would depend on somewhat mechanical events, e.g., whether or not the estate had in fact been distributed to beneficiaries. That is a further indication that this extension of time was intended to be only a procedural extension, and substantive rights were to be determined at the date of the death.

There must be a causative relation between the disposition of the property and the leaving of the widow without adequate provision (see the *Coates* case [20]), and therefore one is thrown back all the time to the disposition. Subsequent events can happen which have no relation to the disposition. If a woman loses her assets for good reason or for bad, on the appellant's view of the Act she can come back to the court and say, "I have "not got adequate provision."

It would be strange if the legislature intended a different field of operation under section 3 (1A), which gave the court power to make provision for a dependant in the case of intestacy, from section 3 (1). Subsection (1A) was introduced in 1938; it is submitted that the problem that *In re R. A. Forsaith* [21] dealt with in 1926 was not one which attracted the attention of the courts in New South Wales over the subsequent years to any large extent. The principle of *Forsaith's* case [21] was not, as it were, an accepted one of law which was applied from week to week in the equity courts; it was a case which had little operation and there are relatively few cases where it arose. So it is submitted that any force which might lie in the view that the legislature by amending adopted the case law would not have effect in this particular case. That touches also on the principle of stare decisis; that principle applies where there is a whole line of authority which has been developed by the courts, and the superior court may well be reluctant to overrule it. There is no line of authority in this case; there is *Forsaith's* case,[21] and the reference to it in *Pichon's* case.[22]

The section is quite consistent with the view that in all cases one looks to the death. That being so, it is properly expressed in the present tense. There is, in fact, no difference in effect between the various Acts of the states, and it was not a mere application of some rule of convenience which led the High Court majority to state the view expressed in *Coates's* case.[23] All the Acts, though some vary slightly in language, have the same general scheme and objective, and it is correct to look at the objective in construing the Act. The absence of the words " upon " his death," which appear in the Tasmanian Act, does not add anything. In the Victorian Act the words are " leaving a will " and without making therein adequate provision "; but that does not alter the sense of the section; the word " therein " does not add anything.

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[20] 95 C.L.R. 494, 525.

[21] 26 N.S.W.S.R. 613.

[22] 47 N.S.W.S.R. 186.

The majority of the High Court made the correct approach in the instant case; one has to look at the date of the death to see whether this widow was left without adequate provision, and one is entitled to take into account reasonably foreseeable events which may happen in the future, and to do so objectively. Reliance is placed on what Kitto J. said in *Coates's* case [24] on the application of the wise and just father idea which lies behind *In re Allardice*.[25] The court has to have regard to the various contingencies which may occur when it makes its order, and has to see whether the testator had regard to the various events which might occur when he made his will, and the only way to do that is to discover what is reasonably foreseeable. That may sound difficult, but that is what the court in making this order is doing the whole time. In every case it has to look to the future; it can only make an order once.

The testator could never have foreseen the temporary prosperity amongst the graziers and the rise in wool and land prices, so there was no reason why he should have given her more income. Nor could the testator reasonably have foreseen that, having made the provision he did for his widow, 13 years later she would have left only a house with a mortgage of £4,200 on it. This widow was adequately provided for on any view of the circumstances. She was not entitled to the whole income of his estate. [Reference was also made to *Ormond Investment Co. Ltd.* v. *Betts*,[26] which was distinguished in *In re Earl Fitzwilliam's Agreement*,[27] to *Delacour* v. *Waddington* [28] and *In re H. F. Parr, decd.*[29]]

Wallace Q.C. in reply. In *Royal Crown Derby Porcelain Co.*

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[23] 26 N.S.W.S.R. 613.
[24] 95 C.L.R. 494, 526.
[25] (1910) 29 N.Z.L.R. 959, 970.
[26] [1928] A.C. 143.
[27] [1950] Ch. 448, 460; 66 T.L.R. (Pt. 1) 174; [1950] 1 All E.R. 191.
[28] (1953) 89 C.L.R. 117.
[29] (1929) 30 N.S.W.S.R. 10, 14.

Ltd. v. *Russell*[30] Denning L.J. said: ". . . the court will be "slow to overrule a previous decision on the interpretation of "a statute when it has long been acted on, and it will be more "than usually slow to do so when Parliament has, since the "decision, re-enacted the statute in the same terms." *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.*[31] was referred to in that case. "Re-enactment" is covered in the present case in a practical sense; there were amendments in 1938 and 1954 to the principal Act, and when that was done they were saying in effect, "in the light of judicial interpretation of the words of "the Act, we now extend the right to apply." The rule is equally applicable to the amendment. This matter of extension of time is not a procedural point; it is clearly a matter of substance. The principle can and ought to be applied to a proper type of amendment, and certainly to this case. *In re R. A. Forsaith*[32] has been consistently acted upon: see *In re Larkin.*[33] The New South Wales Act should be considered on its merits. If, however, *Coates's* case[34] is correct and has to be applied to the New South Wales Act, then, of course, the question is whether he should have foreseen the possibility of any economic changes. The *Bosch* case[35] has been misunderstood in its application; the Board impliedly were saying, "you look at the whole state of "affairs." Harvey J. was right in *Forsaith*[36] on the matter of construction.

April 7. The judgment of their Lordships was delivered by LORD COHEN. This appeal raises a short but important point under a New South Wales statute, the Testator's Family Maintenance and Guardianship of Infants Act, 1916–54. This Act is one of a series of similar, though not identical, Acts which were introduced in New Zealand and in each of the Australian states to enable the court to modify the provisions of the will of a testator who in the opinion of the court had not made adequate provision for the maintenance, education or advancement in life of his or her widow, husband or children by ordering such provision for that purpose as the court might think fit. The question which has now to be decided is whether upon an application under the Act by or on behalf of a dependant of a testator the court, in deciding on the adequacy of the provision, should have regard to the facts as they existed at the date of the application or to the facts as they existed at the date of the testator's death. It was not disputed that if the latter were the correct date the courts should take into account not only events which had already occurred, but also such happenings as the testator might reasonably be expected to foresee immediately before he died.

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[30] [1949] 2 K.B. 417, 429; [1949] 1 All E.R. 749.

[31] [1933] A.C. 402; 49 T.L.R. 391.

[32] 26 N.S.W.S.R. 613.

[33] [1957] S.R.(N.S.W.) 369, 376.

[34] 95 C.L.R. 494.

[35] [1938] A.C. 463.

[36] 26 N.S.W.S.R. 613.

Before going into the facts of the case it will be convenient to consider the New South Wales statutes which affect the matter. The first statute was introduced in 1916. Section 3 (1) of the Act (which has remained unchanged throughout) was in the following terms:

"3. (1) If any person (hereinafter called 'the testator') dying "or having died since the 7th day of October one thousand "nine hundred and fifteen disposes of or has disposed of his "property either wholly or partly by will in such a manner that "the widow, husband, or children of such person, or any or all "of them, are left without adequate provision for their proper "maintenance, education or advancement in life as the case may "be, the court may at its discretion, and taking into considera- "tion all the circumstances of the case, on application by or on "behalf of such wife, husband or children, or any of them, order "that such provision for such maintenance, education, and ad- "vancement as the court thinks fit shall be made out of the "estate of the testator for such wife, husband, or children, or "any or all of them."

The original Act contained no power to make additional provision for a dependant in the case of intestacy where the court was of opinion that the Wills, Probate and Administration Act did not make adequate provision for such dependant. That power was conferred by an amending Act in 1938 which added the following new subsection to section 3:

"(1A) If any person (hereinafter called 'the intestate') "dies wholly intestate after the commencement of the Con- "veyancing, Trustee and Probate (Amendment) Act, 1938, and, "in consequence of the provisions of the Wills, Probate and "Administration Act, 1898, as amended by subsequent Acts, "that are applicable to the distribution of his estate as on "intestacy, his widow, or children, or any or all of them, are "left without adequate provision for their proper maintenance, "education, or advancement in life as the case may be, the "court may, at its discretion and taking into consideration all "the circumstances of the case, upon application made by or "on behalf of such widow, or children, or any of them, order "that such provision for such maintenance, education and advancement as the court thinks fit shall be made out of the "estate of such person."

Subsections (2) and (3) of section 3 contain provisions relating to the exercise of the power conferred by subsection (1). They read as follows:

"(2) The Court may attach such conditions to the Order as "it thinks fit, or may refuse to make an Order in favour of any "person whose character or conduct is such as to disentitle him "to the benefit of such an Order.

"(3) In making an Order the Court may, if it thinks fit, order "that the provision may consist of a lump sum, or periodical "or other payments."

Subsection (4) enacts that every provision made under the Act shall, subject to the Act, take effect as if it were a codicil executed immediately before the death of the testator.

Section 5 of the 1916 Act contains limitation provisions requiring the application to be made in the case of a testator dying before the passing of the Act within three months of the date of such passing and in any other case within 12 months of the grant of probate of the will of the testator. When in 1938 applications were made possible in the case of an intestacy a new subsection was added to section 5 requiring any such application to be made within 12 months of the grant of letters of administration.

Until 1954 there was no power to extend the time limits thus fixed, but in that year power to extend the time was conferred by the Administration of Estates Act, 1954, which (inter alia) introduced into section 5 the following new subsection:

"(2A) Notwithstanding anything in subsections (1) and (2) of "this section: (*a*) The time for making an application under "either of those subsections may be extended for a further "period by the Court, after hearing such of the parties affected "as the Court thinks necessary, and this power extends to cases "where the time for applying has already expired, including cases "where it has expired before the commencement of the Administration of Estates Act, 1954, but every application for "extension shall be made before the final distribution of the "estate, and no distribution of any part of the estate made "before the application shall be disturbed by reason of the "application or of an Order made thereon."

Their Lordships turn now to the facts of the present case. The applicant (the present appellant) was the widow of Thomas Fitzgerald Dun, who died on September 10, 1942. By his will made on August 18, 1939, he bequeathed to the applicant certain household and personal effects and pecuniary legacies aggregating £A2,000. He also bequeathed to her an annuity of £A600 per annum. By a codicil made on May 16, 1942, he increased this annuity to £A800 per annum and directed that it should be paid free of tax. Subject to certain minor bequests and in the events which happened the testator devised and bequeathed the residue of his estate upon trust for such of his brothers and sisters as should be living at the date of his death in equal shares.

The respondents are the present trustees of the testator's will. At the time of the death of the testator his estate was valued at £A22,216. The appellant at that date owned land with a building on it towards which the testator had contributed £A3,066. She also owned other property which she had sold for £A4,600 before the date of the application herein.

Having regard to these figures it is not surprising that the appellant made no application under section 3 within 12 months of the grant of probate of the testator's will. By the time that the amending Act of 1954 had become law the position had altered. In 1955 the testator's estate consisted almost entirely of liquid assets and their value was said to be £A82,000. On the other hand, the appellant's position had deteriorated. All that was left of her assets was the former matrimonial home, said to be worth £A8,500 but subject to a mortgage to secure the repayment of the sum of £A4,200.

Taking advantage of the new subsection (2A) of section 5 of the Act the appellant applied for an extension of the time allowed for making an application under section 3 (1) of the Act of 1916, and on June 3, 1955, Myers J. extended the time until June 17, 1955. On June 16, 1955, the appellant made the substantive application under section 3 (1). This came before the Chief Justice in Equity (Roper C.J.), and on August 16, 1956, he granted the application, ordering that in addition to the provisions made for her in the will and codicil of the testator the appellant be paid a legacy of £A5,000 payable on September 30, 1956, and that as from July 1, 1956, in lieu of the annuity and income tax benefits provided in her favour the applicant be paid an annuity of £A1,500 per annum.

In reaching his conclusion Roper C.J. in Equity said that he thought it was clear that had the appellant brought her application within 12 months of the grant of probate, and had that application been heard within the normal reasonable time thereafter, it must have failed, whether the time for considering the circumstances had been taken as the date of death or as the date of hearing the application. He called attention. however, to the subsequent change in circumstances both of the testator's estate and of the appellant, to which their Lordships have already referred, and said that he had now to decide which was the correct date to apply. Basing himself on *In re R. A. Forsaith*,[1] he held that the time at which the existing circumstances should be considered is the date on which the court hears the application. He said that that decision had stood for 30 years and that, although the number of cases in which a material difference exists between the results of considering the circumstances existing at the hearing on the one hand, and at the date of death on the other, are relatively few, there must have been a number of them, and he referred to *In re A. L. Pichon*.[2]

He recognised that a different view had been taken in cases under similar statutes in Victoria, in Queensland and in Tasmania, but he said that there were slight but important differences between the Acts in force in those states and the New South Wales Act. He also pointed out that under the South Australia Act which, so far as the point under consideration is concerned, is almost identical with the New South Wales Act, the principle of *In re R. A. Forsaith* [3] had been adopted.

Having reached the conclusion that the material time was the date of the hearing of the application, he held that the appellant qualified for an order and made the order their Lordships have stated.

Unfortunately, unknown to the Chief Justice in Equity, the correctness of the decision in *In re R. A. Forsaith* [3] had been considered by the High Court of Australia in the case of *Coates* v. *National Trustees, Executors and Agency Co. Ltd.*[4] Judgment in that case had been given on June 6, 1956. Since the decision in *Coates's* case [4] formed the basis of the High Court decision in the present case their Lordships must consider it at some length. In that case the relevant statutory provision in Victoria was section 139 of the Administration and Probate Act, 1928, as amended by the Administration and Probate (Testators Family Maintenance) Act, 1957. This section as so amended reads, so far as material, as follows: "If any person . . . dies . . . leaving "a will and without making therein adequate provision for the "proper maintenance and support of the testator's widow, "widower or children the court may in its discretion on application by or on behalf of the said widow, widower or children "order that such provision as the court thinks fit shall be made "out of the estate of the testator for such widow, widower or "children."

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[1] (1926) 26 N.S.W.S.R. 613.
[2] (1946) 47 N.S.W.S.R. 186.
[3] 26 N.S.W.S.R. 613.
[4] (1956) 95 C.L.R. 494.

It is unnecessary to refer to the facts of the particular case under consideration in *In re Coates* [4]; it is sufficient to say that the High Court by a majority consisting of Dixon C.J., Webb and Kitto JJ., came to the conclusion that the question whether the provision made in a will for an applicant is inadequate for his proper maintenance is to be determined, according to the circumstances existing not as at the date of the hearing of the application, but as at the date of the death of the testator although, if the question be answered in the affirmative the court, in exercising its discretionary power to make such provision as it thinks fit, must take into account the facts as they exist at the time of making its order.

In reaching his conclusion Dixon C.J. referred to decisions in New Zealand and some of the Australian states in cases arising under similar statutes. He pointed out that in New Zealand, Tasmania, Victoria and Queensland the view had been taken that the question was to be determined as at the date of the death of the testator or testatrix, whereas in New South Wales and South Australia the view had been adopted that the sufficiency of the provision in the will must be determined as at the time when the court is dealing with the question. Referring to *In re R. A. Forsaith* [5] he cited the observation of Harvey C.J. in Equity in that case that "looking at the words of the Tasmanian statute "there is no loophole of escape from that construction," i.e., a construction adopting the date of death as the crucial date. Dixon C.J. continued [6]: "In spite of the difference in language "between the New South Wales Act and the Tasmanian and for "that matter the Victorian, it may be doubted whether the distinction taken by Harvey C.J. in Equity is well founded. The "legislation of the various states is all grounded on the same "policy and found its source in New Zealand. Refined distinctions between the Acts are to be avoided." Accordingly, he preferred the Victorian view that the material date was the date of the death, but he pointed out that the question what is proper maintenance and support involves the future of the dependant to be maintained or supported and that, accordingly, the testator must be presumed to take into account contingent events as well as what may be considered certain or exceedingly likely to happen.

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[4] (1956) 95 C.L.R. 494.

[5] 26 N.S.W.S.R. 613.

[6] 95 C.L.R. 507.

Kitto J. summed up his reason for agreeing with the Chief Justice in the following passage [7]: " It remains only to say ex- " plicitly that once an applicant establishes that the case falls " within the class in which the court is given jurisdiction, the " circumstances as they then exist may and should receive full " consideration by the court in deciding what provision it thinks " fit to make for the proper maintenance and support of the " applicant. It is true to say that in the light of all those circum- " stances the court will do what it considers wise and just for " the purpose. But this has no bearing upon the question which " is before the court at the preliminary stage—the question " whether the case is shown to be within the limits which the " legislature has seen fit to set to the extraordinary jurisdiction it " has conferred on the court. At that stage the court must be " satisfied, before commencing to think what provision it would " be wise and just to make in the circumstances as they then " exist, that the testator's will did not operate to make such a " provision for the applicant's maintenance and support as would " have been made if a complete knowledge of the situation and a " due sense of moral obligation with respect to those matters had " combined to dictate a new will to the testator immediately " before he died."

Having regard to the decision in *Coates's* case [8] the respondent executors appealed to the High Court of Australia in the present case, and the High Court by a majority of three (Dixon C.J., Kitto and Taylor JJ.) to two (McTiernan and Williams JJ.) allowed the appeal and dismissed the application. Their Lordships all agreed that in view of the decision in *Coates's* case [8] the material time in deciding whether the court had a discretion to vary the will must be taken to be the date of the testator's death. They also agreed that in reaching its decision the court was entitled to take into account circumstances which should have been foreseen by the testator at the time of his death, but they differed in the application of this principle to the facts of the present case. The majority said: " But there is nothing in the " case to suggest that the vast increase in the value of the estate

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[7] 95 C.L.R. 528.

[8] 95 C.L.R. 494.

"could have been foreseen; indeed, it may well be thought that "if the events which produced this result could reasonably have "been foreseen their actual occurrence would not have occasioned "such a marked and rapid increase in the value of the estate. "Looking at the circumstances as they existed at the death of "the testator we think it is impossible to say that the provision "made by him for the applicant was ungenerous and when regard "is had to the incidence of death and estate duties and testamentary expenses; it is clear that it cannot be characterised as "inadequate. On the contrary, if, as the testator appears to "have thought, it was desirable that the main provision for his "widow should consist of an annuity, he may well have considered that the annuity provided by his codicil was as much as "his estate would be able to provide. As already appears, it is "clear that Roper J. would have dismissed the respondent's "application if he had been aware that *In re R. A. Forsaith*[9] "had been overruled. We agree that such a result would have "been inevitable and, accordingly, the appeal should be allowed "and the order of the Supreme Court set aside."

McTiernan and Williams JJ. took the opposite view. Since their conclusion is that which Mr. Wallace invited their Lordships to adopt, it will be convenient to cite the material passage from the judgment of Williams J.: "What he [the testator] did not "appear to foresee, but he reasonably might have foreseen, was "that the longer the war continued the more serious its economic "consequences would be upon the value of money and the cost "of living and therefore upon the financial position of people with "fixed incomes. He evidently foresaw that it would probably not "be advisable to sell his farm or produce business for some time "after his death, presumably because he considered that it was "likely that the income and assets of his estate would be built up "by continuing these businesses, and he must evidently have "contemplated that this would assist his widow because he "provided that no sale was to take place for five years after his "death without her consent. The only vital thing that he "appears to have overlooked in deciding what would be adequate "for the proper maintenance of his widow in the future stretching "forward from his death, which it can be said that as a wise "husband he should have been able to foresee, was the danger of "providing for his widow, then only 42 years of age, mainly "leaving her a fixed income. The testator in his wisdom should

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[9] 26 N.S.W.S.R. 613.

"have realised, as Mr. Wallace submitted, that the only safe "course would be to leave her at least the income or a proportion "of the income of his estate, but with a proviso that if her "income fell below a certain amount it should be supplemented "out of capital, either as of course or possibly at the discretion "of his trustees. As he had no children his widow was the only "person with any real moral claim upon his bounty."

From the decision of the High Court the appellant, by leave granted by Order in Council made on June 3, 1958, appealed to this Board. Mr. Wallace on her behalf submitted that: I. Whatever be the true construction of the statutes dealing with similar subject-matter in other jurisdictions than New South Wales, the New South Wales statute must be construed according to its own language and so construed the material date for all purposes under section 3 (1) was the date of hearing the application. II. Even if the date of death was the material date, the correct conclusion as to what the testator should have foreseen was that indicated by Williams J., and on this ground the judgment of the trial judge should be restored.

On the first point Mr. Wallace relied on the decision of Harvey C.J. in Equity in *In re R. A. Forsaith.*[10] The judge in that case based his conclusion on two points, (1) the omission in the Victorian statute of the words "upon his death," which in the Tasmanian statute follow upon the words "in such manner "that," and (2) the use of the words "are left," bearing in mind that the section applies not only to persons dying after the passing of the Act but also to persons who died between October 7, 1915, and the passing of the Act. "I think," said his Honour,[11] "in the cases of such wills the court would be "forced to the conclusion that the period of time which was "to be considered was the date on which the court was dealing "with the matter, and the same construction, therefore, must "apply in the case of all wills which are the subject of the "section."

Neither of these points carry conviction to their Lordships' minds. On the first point their Lordships agree with Mr. Wallace that the courts' first duty is to consider the meaning of the language used in the particular statute under consideration, but quite apart from decisions on other statutes their Lordships are of opinion that the natural construction of a section dealing with the question whether a testator's dependants "are left" without adequate provision is to look at the date when he left them, i.e., the date of his death. Nor do their Lordships think that this conclusion is affected by the fact that the section applies to testators who died between October 7, 1915, and the passing of the Act on September 18, 1916. Their Lordships can see no reason why in deciding whether such a testator had made adequate provisions for his dependants, the court should not look at the position as it was on the date of the testator's death. The case of a testator who died before September 18, 1916, is not before their Lordships, but their Lordships as at present advised prefer the date of the death in the case of such a testator to the date suggested by Kitto J. in *Coates's* case,[12] viz., the date of the commencement of the Act.

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[10] 26 N.S.W.S.R. 613.

[11] Ibid. 614.

In re A. L. Pichon [13] does not carry the matter any further. In that case the testatrix had made no provision for her only child and left the whole of her estate to her executor M. beneficially. The executor died before the application under section 3 (1) came on for hearing. On these facts, quite apart from the fact of the death of M., there was a prima facie case of inadequate provision for the daughter. In exercising his discretion as to the amount of the further provision to be made Roper J. would clearly have been entitled to take into account the fact that the only beneficiary named in the will was dead.

The two South Australian cases to which their Lordships' attention was called also carry the matter no further. In *In re Gerloff* [14] Richards J. refers to *In re R. A. Forsaith* [15] with approval, but expressly says he did not find it necessary to express a definite opinion on the question of date. In *In re Wheare* [16] Paine A.J. follows *In re R. A. Forsaith* [17] and adds "there is, I "think, another provision in our Act which warrants that "decision. Section 5 (4) of our Act enables the court at any "time and from time to time to rescind or alter any order." It is not clear whether the judge thought that this section would enable a provision already made to be increased. The corresponding section in the New South Wales Act is section 6, subsection (4). Their Lordships do not think this section would enable a provision made by a previous order to be increased; as was pointed out in *In re Denis Molloy, decd.*,[18] its purport is to enable a provision made under the Act to be reduced or cancelled. So, also, section 8 enables the court to reduce or discharge an order for periodic payments where the circumstances of the dependant in whose favour the order was made improves. Their Lordships do not think, therefore, that these provisions throw any light on the question they have now to decide.

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[12] 95 C.L.R. 494, 525.

[13] 47 N.S.W.S.R. 186.

[14] [1941] S.A.S.R. 156, 161.

[15] 26 N.S.W.S.R. 613.

[16] [1950] S.A.S.R. 61.

[17] 26 N.S.W.S.R. 613.

[18] (1926) 28 N.S.W.S.R. 546.

Mr. Wallace's sheet anchor on his first point was the judgment of Fullagar J. in *Coates's* case [19] in which, while agreeing with the order which was made, he dissented on the question of the material date. The main grounds of his dissent were: (1) that to take the date as the date of hearing the application would be more in accord with the general object of the legislation and would give the court a freer hand in the exercise of a wide discretion; (2) it is more realistic; (3) it avoids an unnecessary question—what must the testator be taken to foresee?—which savours of artificiality and which often cannot be satisfactorily answered.

Their Lordships recognise the force of these observations but do not think they can justify a disregard of what their Lordships consider to be the plain meaning of the statute. Moreover, their Lordships think that the intention of all the statutes in this field was to enable the court to vary the provisions of a will in cases where it was satisfied that the testator had not made proper provision for a dependant: it would be contrary to this intention to judge a testator not by the position as it was at the time of his death but by the position as it might be as the result of circumstances which the testator could not reasonably have been expected to foresee. Their Lordships recognise that it may sometimes be difficult to determine what the testator should have foreseen, but the difficulty is no greater than is often incurred in assessing damages in personal injury cases and Parliament has not hesitated to cast this burden on a judge.

Reference was made in the course of the argument to the decision of this Board in *Bosch* v. *Perpetual Trustee Co.*,[20] a decision on the section which their Lordships are now considering. The question of the material date in deciding whether the court had jurisdiction was not in issue, but their Lordships think that the observations of Lord Romer, delivering the decision of the Board, as to the proper approach of a judge dealing with an application of an Act are of assistance. Lord Romer said [21]: "Their Lordships agree that in every case the court must place

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[19] 95 C.L.R. 494, 521.

[20] [1938] A.C. 463; 54 T.L.R. 467; [1938] 2 All E.R. 14.

[21] [1938] A.C. 478–479.

" itself in the position of the testator and consider what he ought " to have done in all the circumstances of the case, treating the " testator for that purpose as a wise and just, rather than a fond " and foolish, husband or father. This no doubt is what the " learned judge meant by a just, but not a loving, husband or " father. As was truly said by Salmond J. in *In re Allen, decd.*, " *Allen* v. *Manchester*[22]: 'The Act is . . . designed to enforce " 'the moral obligation of a testator to use his testamentary " 'powers for the purpose of making proper and adequate pro- " 'vision after his death for the support of his wife and children, " 'having regard to his means, to the means and deserts of the " 'several claimants, and to the relative urgency of the various " 'moral claims upon his bounty. The provision which the court " 'may properly make in default of testamentary provision is " 'that which a just and wise father would have thought it his " 'moral duty to make in the interests of his widow and children " 'had he been fully aware of all the relevant circumstances'."

If that be, as their Lordships think it is, the correct approach, it seems to their Lordships necessarily to involve that the court must look to the position as at the date of the testator's death.

Mr. Wallace also relied on the amending Acts of 1938 and 1954 as supporting his argument. The first of those Acts introduced section 3 (1A) dealing with cases of intestacy, and their Lordships are unable to see any reason for thinking that the court, in deciding the question of jurisdiction in cases of intestacy, should look at any other date but the date of the death of the intestate.

The provisions of the 1954 Act on which Mr. Wallace relied were those enabling the court to extend the time within which application may be made for provision under section 3, subsection (1) or subsection (1A). He submitted that the intention must have been to enable the court to look at the position as it might be at the date of the hearing of the application for an extension of time in deciding whether to grant an extension and that it followed that if leave were granted the court in dealing with the substantive application must look at the date of hearing of that application for all purposes. Their Lordships do not agree: they think that Mr. Jacobs gave the right answer when he said that the section in question was purely procedural and could not have been intended to effect an alteration in substantive law or to enable an applicant to improve her position by being dilatory in making her application.

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[22] [1922] N.Z.L.R. 218, 220.

Mr. Wallace sought to meet this argument by saying that Parliament when it passed the Act must be taken to have known of the decision in *In re R. A. Forsaith*[23] and to have intended that the court should proceed on the basis that that decision was correct. He said that *In re R. A. Forsaith*[23] had stood unchallenged for 30 years and more. He relied on a passage in the judgment of Viscount Buckmaster in *Barras* v. *Aberdeen Steam Trawling and Fishing Co.*[24] where he said,[25] citing James L.J. in *Ex parte Campbell*[26]: "Where once certain words in "an Act of Parliament have received a judicial construction in "one of the Superior Courts, and the legislature has repeated "them without alteration in a subsequent statute, I conceive "that the legislature must be taken to have used them according "to the meaning which a court of competent jurisdiction has "given to them." Their Lordships accept without question this statement of the law, but the facts of the present case do not make the principle applicable.

Their Lordships desire to refer also on this point to the observations of Denning L.J. in *Royal Crown Derby Porcelain Co. Ltd.* v. *Russell*[27] where he said: "The true view is that "the court will be slow to overrule a previous decision on "the interpretation of a statute when it has long been acted "on, and it will be more than usually slow to do so when "Parliament has, since the decision, re-enacted the statute in "the same terms. But if a decision is, in fact, shown to be "erroneous, there is no rule of law which prevents it being "overruled." In the present case Parliament has not re-enacted the relevant section in the same terms; it has only left it unamended. Moreover, for the reason their Lordships have given they consider the decision in *In re R. A. Forsaith*[28] has been shown to be wrong.

For the reasons their Lordships have stated their Lordships consider that Mr. Wallace's first submission must be rejected and that the material date in determining whether a dependant was left without adequate provision is the date of the testator's death.

It remains to consider whether the majority of the High

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[23] 26 N.S.W.S.R. 613.

[24] [1933] A.C. 402; 49 T.L.R. 391.

[25] [1933] A.C. 412.

[26] (1870) L.R. 5 Ch. 703, 706.

[27] [1949] 2 K.B. 417, 429; [1949] 1 All E.R. 749.

[28] 26 N.S.W.S.R. 613.

Court were right in rejecting his alternative submission that the testator ought to have foreseen the events which in fact occurred and if he had done must have made more ample provision for the appellant.

Two things seem clear, (1) that if the facts as at the date of his death were the only things relevant, the provision made was such that he could not be said to have made inadequate provision for her, (2) that he did take into account what he thought might be the effect of the war, for in May, 1942, he made a codicil increasing the amount of his wife's allowance and made it payable free of tax. Ought he to have foreseen the actual result of the war and post-war conditions? On this point their Lordships are not prepared to differ from the majority of the High Court. It seems to their Lordships that this is just the kind of point on which judges familiar with conditions in Australia are more likely to reach a correct conclusion than their Lordships sitting in London. They would add that on the facts of this case they think they would have reached the same conclusion as the majority of the High Court.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The circumstances are very special and having regard to them their Lordships will make a similar order as to costs to that made by the High Court, namely, that the costs of both the appellant and the respondents be taxed as between solicitor and client and paid and retained out of the estate of the testator.

Solicitors: *Light & Fulton; Bell, Brodrick & Gray.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*

1958
April 28, 29, 30;
May 1;
June 25.

NATIONAL DEPOSIT FRIENDLY SOCIETY TRUSTEES . . . . . . APPELLANTS;

AND

SKEGNESS URBAN DISTRICT COUNCIL . RESPONDENTS.

Rates and Rating—"Social welfare"—Friendly society—Provision of benefits and assurances for members—Benefits provided on actuarial basis—Convalescent home—Claim for rating relief—No element of

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* *Present*: LORD KEITH OF AVONHOLM, LORD MACDERMOTT, LORD SOMERVELL OF HARROW, LORD DENNING and LORD BIRKETT.

National Deposit Friendly Society Trustees *v.* Skegness Urban District Council.

advancement of good of community—Objects not "concerned with "the advancement of . . . social welfare"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8.

Friendly Society.

Ejusdem Generis Rule—Statute—Charity—"Objects charitable or . . . "otherwise concerned with the advancement of religion, education "or social welfare"—Akin to charity—Rating and Valuation (Miscellaneous Provisions) Act, 1955, *s.* 8 (1).

A society registered under the Friendly Societies Acts claimed to be entitled to the benefit of the rating relief under section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of a convalescent home and premises occupied by it on the ground that the hereditament was "occupied for the purposes of "an organisation . . . which is not established or conducted for "profit and whose main objects are charitable or otherwise con-"cerned with the advancement of . . . social welfare" within the meaning of section 2 (1) (*a*). It was conceded that the society was not charitable. At the material time the society consisted of some 700,000 members and its objects were to provide on a mutual basis for pecuniary benefit of relatively small amounts to be paid to its members on the ordinary chances and changes of human life, such as relief during sickness, provision of facilities for convalescent homes, old age pay and payments to a member's family in the event of his death. There was also an insurance section providing on a mutual basis for whole life and endowment assurances for the benefit of members. The home in question was provided by the society for its members. The society's income was devoted to the payment of interest on the deposit accounts of members, the maintenance of sufficient funds to provide on an actuarial basis for the benefits to which the members were entitled in accordance with the rules and the payment of expenses of management. No member received any dividend or share of income other than the interest at 2½ per cent. on moneys standing to the credit of his deposit account, and such sickness and other benefits as were provided for by the rules. There were certain qualifications for membership, certain restrictions being imposed as regarded health, occupation and age. A candidate was to be "in good health, of "sound constitution with no hereditary family complaint," and must "not be following an occupation considered by the committee "of management to be risky or injurious to health." The members were of the lower wage-earning class:—

Held, (1) that the society was not "established or conducted for "profit."

New York Life Insurance Co. v. *Styles* (1889) 14 App.Cas. 381; 5 T.L.R. 621 applied.

Per Lord Denning. The profit made from its investments was not its main object but only a subsidiary object, a means whereby its main objects could be achieved.

Reg. v. *Whitmarsh* (1850) 15 Q.B. 600 considered.

(2) That the society was not "concerned with the advancement "of . . . social welfare"; the objects envisaged by section 8 (1) (*a*)

were objects which were also the concern of charitable organisations but which might fall short of the definition of "charitable "purposes" in the strictly legal sense; this society, which was established entirely for the common benefit of its members, lacked the element of altruism or public benefit required by the section and, accordingly, was not entitled to relief.

Decision of the Court of Appeal [1957] 2 Q.B. 573; [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199 affirmed.

APPEAL from the Court of Appeal (Hodson, Parker and Ormerod L.JJ.).

This was an appeal from the order of the Court of Appeal dated July 30, 1957 (after hearing on July 8, 9 and 10, 1957) dismissing an appeal by the appellants, the trustees of the National Deposit Friendly Society, from an order of the Divisional Court of the Queen's Bench Division (Lord Goddard C.J., Cassels and Lynskey JJ.) made on January 24, 1957. The order of the Divisional Court was made on a case stated by quarter sessions for the County of Lincoln (Parts of Lindsey) and affirmed an order of sessions made on September 17, 1956, dismissing an appeal by the appellants after the refusal of the respondents, Skegness Urban District Council, to grant them the relief against rates provided by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of the hereditament known as "No. 2427 convalescent home, grounds and premises, "North Parade, Skegness, in the County of Lincoln (Parts of "Lindsey)." The respondents made a demand on the appellants for a rate for the year beginning April 1, 1956, amounting to £1,983 4s., in respect of their occupation of the hereditament. The rate charged in respect of the hereditament for the year ending March 31, 1956, was £786 10s., and the appellants claimed that no higher rate should be charged for the following year, the first year of the new valuation list under the Act of 1955.

No dispute arose upon the facts. The appellants stated in paragraphs 5, 6 and 7 of their printed case:

"(5) The appellants are the owners and occupiers of a con"valescent home and premises situate at North Parade, Skegness, "and the respondents are the rating authority for the area in "which the said premises are situate. . . .

"(6) The appellants are the trustees of a friendly society "known as the National Deposit Friendly Society founded in "1868 and first registered under the Friendly Societies Acts on "August 27, 1872. At the material time the society consisted "of some 700,000 members, and its objects are to provide on a "mutual basis for pecuniary benefits of relatively small amounts "to be paid to its members upon the ordinary chances and "changes of human life such as relief during sickness, provision "of facilities in convalescent homes, old age pay and payments "to a member's family in the event of his death. The society "also contains an insurance section providing on a mutual basis "for whole life and endowment assurances for the benefit of "members.

"(7) The society has no proprietors or shareholders, and all "subscriptions received from members or income from investments held by the society are applied to the provision of the "benefits above referred to. The committee of management, "divisional committees and district committees of the society "are not entitled to receive any remuneration for their services "apart from travelling and subsistence allowances. The amount "of each member's subscription is calculated on an actuarial "basis to ensure that the income of the society is sufficient to "provide the benefits prescribed by the society's rules. No "dividend or share of income is paid to members except that "each member is entitled to interest at 2½ per cent. per annum "on the amount standing to his credit with the society in addition to the benefits so prescribed by the rules of the society. "The last-named benefits are not available to anyone who is "not a member of the society." The subscriptions received from the members and the income of the society's investments were applied for the provision of benefits.

The further facts stated by Lord Keith of Avonholm, Lord MacDermott and Lord Denning were as follows: The largest section of the undertaking was the deposit section. Out of the contributions paid by the members the society paid the sickness and other benefits and any surplus was credited to the members' deposit accounts, but many members, in addition to their contributions, often made direct payments into their deposit accounts. These direct payments in all amounted to very large sums. The deposit accounts could be withdrawn on notice. The society invested the contributions and deposits in authorised investments.

The hereditament in question here was used by the society as a convalescent home for its members, the provision of accommodation in such a home being one of the benefits provided by the rules of the society, which had many properties in different parts of England.

H. L. (E.)
1958

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By rule 2 (1) of the society's rules "The objects of the "society shall be to provide by voluntary contributions and "deposits of the members for" relief during sickness, medical benefits, old age pay and money to be received on death, the membership being classed in (a) the deposit section, (b) the alternative benefit section and (c) the assurance section. By rule 2 (2): "The society shall accumulate at interest for the use "of any member of the deposit or the alternative benefit sections "any surplus of his contributions to the funds of the society "which may remain after providing for the assurances in respect "of which the contributions are paid."

By rule 83 (1): "The committee of management . . . may, "at their discretion admit as benefit members of the society "persons . . . who . . . (*b*) satisfy the committee of management "regarding age, health, character and occupation." By rule 83 (2) (*a*) the members were classified according to age at admission. Certain restrictions were imposed as regarded health, occupation and age. Thus: "A candidate shall be in good health, of sound "constitution, with no hereditary family complaint and shall not "be following an occupation considered by the committee of "management to be risky or injurious to health." (Rule 83 (2) (*c*).)

A candidate unable to fulfil these conditions "may be "admitted in a class lower than that to which his age entitles "him." (Rule 83 (2) (*d*).)

"The admission of males from 45 to 50 years of age, and "females from 40 to 45 years of age, shall be conditional upon the "payment by them of a premium to the sickness reserve "fund . . ." (Rule 83 (2) (*e*).)

Members might be reclassified by the committee of management in certain circumstances, among which may be noted "upon "change of employment to an occupation considered by the "committee of management to be risky or injurious to health" (rule 83 (4) (*a*) (ii)), and, on the application of a member, upon ceasing to follow such an occupation, if the member was a male not over 50 years of age or, if a female, not over 45 years of age at the time of the application (rule 83 (4) (*b*) (ii)).

It was also provided by rule 96 (1): "A member shall forfeit "his title to any benefit other than death benefit when: (*a*) He "shall refuse to answer satisfactorily any question respecting his "health or employment put to him by an officer of the society, "or shall by any wilful act prevent or delay the recovery of his "health. (*b*) His monthly contributions are four months in "arrear. (*c*) He is suffering from any complaint, disease, sick-"ness or injury which he concealed at the time of his admission "into the society, or which he may have contracted by profligacy, "drunkenness or by any act whatsoever contrary to law."

Regulations of a corresponding character were made for admission to the alternative benefit section.

Separate provision was also made for admission to the insurance section with a limit of £500 payable on death of a member or under an endowment insurance and of £104 a year for a pension or annuity. It was accepted by both sides that the society, subject to the restrictions of the Friendly Societies Acts, was truly a mutual insurance society.

The members' balances stood at £14,000,000. The society possessed investments amounting to over £22,000,000 in book value and over £21,000,000 in market value (producing an annual income of £880,000), as well as other assets, which resulted in a surplus fund of £448,066 at December 31, 1955, after debiting members' balances, various reserve funds and other liabilities. The reserve was credited in the accounts, as to £5½ million to the sickness reserve fund and £2½ million to the death benefit fund.

In the case stated by quarter sessions it was found in paragraph 2, inter alia: "(D) The policy of the appellants in the "investment of their accumulated funds is to choose investments "which offer the highest return of income consistent with security "of capital. No attempt is made to select investments with a "view to capital accretion. (E) The income of the appellants is "devoted to the payment of interest on the deposit accounts of "members, the maintenance of sufficient funds to provide on an "actuarial basis for the benefits to which their members are "entitled in accordance with the said rules and the payment of "expenses of management. No member receives any dividend "or share of income other than interest at 2½ per cent on moneys "standing to the credit of his deposit account and such sickness "or other benefits as are provided by the said rules. (F) So far "as the questions are questions of fact (1) the appellant society "is not established or conducted for profit; and (2) apart from "the welfare of individuals who subscribe, there is absent any "element of advancement of the good of the community because "the society's benefits are not available to anyone who is not a "member." They were of opinion "(A) that the appellants are "an organisation which is not established or conducted for profit;

"but (B) that the appellants, being concerned only with the "provision of benefits for their own members, the main objects "of the appellants were not concerned with the advancement of "social welfare within the meaning of the said section 8" (para. 6).

On appeal to the Divisional Court, the court agreed that the quarter sessions had come to a right decision and dismissed the appeal. On further appeal to the Court of Appeal this decision was upheld, Parker L.J. giving the judgment of the court. The case now came, with leave of the Court of Appeal, to the House of Lords.

John Pennycuick Q.C., *John Widgery Q.C.* and *D. Barker* for the appellants. Before the passing of the Act of 1955 no charitable or kindred organisation could claim as of right to be relieved from liability to pay the general rate on any property occupied by it, but in some rating areas it was the practice of the rating authority to make sympathetic assessments on charitable organisations as a matter of grace. For an organisation to come within section 8 of the Act it must be shown (1) that it is "not established or conducted for profit," and (2) that its "main objects "are charitable or are otherwise concerned with the advancement "of religion, education or social welfare." Admittedly the society is not concerned with the advancement of religion or education. In the section the words "advancement of" qualify "education" and "social welfare" as well as "religion."

The expression "social welfare" connotes a connection with the lower income groups; it connotes the encouragement of thrift but also covers such objects as the provision of playing fields and the like. To secure persons against sickness, disability and death is also a matter of social welfare. Like "prosperity," "social welfare" denotes a certain state or condition and not the act of providing it. One form of social welfare is that provided by employers for their employees, though these are not a section of the public in this context. A typical form of social welfare has been miners' welfare.

This section applies, not only to persons administering educational establishments like schools, but also to trustees providing funds that a body of the public may be educated. In the case of charities the public element is essential, but under section 8 the words "otherwise concerned with" let in other cases. One advances religion if one makes people (including oneself) more religious: see *Gilmour* v. *Coats*.[1] If "advancement" meant promotion only among other people, that would rule out the appellants, but that is not its natural meaning.

As to the question of social welfare, see *Inland Revenue Commissioners* v. *Baddeley*.[2] The expression "social welfare" is apt to cover what can comprehensively be called "social "security." See also *Berry* v. *St. Marylebone Borough Council*[3] and the Recreational Charities Act, 1958.

The "advancement" of education and religion is an expression as old as *Income Tax Special Commissioners* v. *Pemsel*,[4] and no distinction has ever been drawn between trusts for religion or education and trusts for their "advancement." The question has always been whether the trust had the necessary element of public benefit: see *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*[5] and Halsbury's Laws of England, 3rd ed., vol. IV, p. 218, para. 496. The question in charity cases is: What is the class of persons whom you have benefited? "Social welfare" must include the protection of weekly wage-earners against sickness, disability and death. Now a vast proportion of the population earn wages which enable them to provide themselves with various comforts and with this sort of protection. Therefore, "social "welfare" cannot apply only to the indigent, but applies also to what used to be called "the working classes" generally, who are not paupers. There is no reason to distinguish between providing the benefits from outside or from within. Welfare which is only within the reach of the rich is not enough, but welfare within the reach of the poor is not excluded because it is also within the reach of the rich. *British Launderers' Research Association* v. *Hendon Rating Authority*[6] is distinguishable. The motive of joining the society is irrelevant.

All the objects of the society, which is admittedly not charitable, are concerned with providing certain benefits to members by reason of their contributions and deposits. It has advanced social security in giving it to a number of people; that is how social security is advanced. Thus, the advancement of education does not mean the advancement of the theory of education only; it means giving people education. Any organisation concerned with the advancement of social welfare as its main object is within the benefit of section 8 of the Act of 1955.

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[1] [1949] A.C. 426; 65 T.L.R. 234; [1949] 1 All E.R. 848.

[2] [1955] A.C. 572, 586, 613, 615; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525.

[3] [1958] Ch. 406; [1957] 3 W.L.R. 1029; [1957] 3 All E.R. 677.

[4] [1891] A.C. 53; 7 T.L.R. 657.

[5] [1951] A.C. 297, 316; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

[6] [1949] 1 K.B. 434; 65 T.L.R. 103; [1949] 1 All E.R. 21.

Friendly societies are given exemption from income tax. They are societies which Parliament has seen fit to benefit in fiscal spheres. The main objects of this society are to advance social welfare in the sense of social security. It is irrelevant that social welfare is advanced among its own members; the members in fact are a very large section of the community.

Stag Line Ltd. v. *Foscolo Mango & Co. Ltd.*[7] is really dealing with the ejusdem generis point.

On the question whether the appellants' society is "established or conducted for profit," they hold the judgments of the courts below throughout. The society carries on mutual insurance business between its members and has no dealings with non-members. It is covered by *New York Life Insurance Co.* v. *Styles*,[8] *per* Lord Watson and Lord Macnaghten. That case is conclusive. This society is neither established nor conducted for profit, since a surplus arising from dealing with its own members is not profit. Every society must have surplus funds and the proper course is to invest them. See section 440 (1) of the Income Tax Act, 1952. This society is not to be treated as established for profit because it derives income from investments: see *Reg.* v. *Whitmarsh*[9] and *Bear* v. *Bromley*.[10] The only main object of this society is to have dealings with its members; enjoying the income from its surplus is purely incidental and not a main object.

John Widgery Q.C. following. The valuation list is normally revised every five years, but when the Act of 1955 was passed there had been none since before the war and assessments were ridiculously low by 1955 standards. Section 2 of the Valuation for Rating Act, 1953, gave householders special privileges by a temporary provision that dwelling-houses, private garages and private storage premises should be rated at 1939 values for the first valuation list after March 31, 1956. Thus, assessments would not all go up in the same proportion. A greater burden was accordingly put on other premises, including those of associations not carried on for profit. It was for this reason that the relief introduced by section 8 of the Act of 1955 was accorded as a subsidiary provision expressed in relatively wide terms and analogous to the earlier concession to householders. Since then

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[7] [1932] A.C. 328; 48 T.L.R. 127.

[8] (1889) 14 App.Cas. 381, 394, 411; 5 T.L.R. 621.

[9] (1850) 15 Q.B. 600, 618.

[10] (1852) 18 Q.B. 271.

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another concession has been accorded by the Rating and Valuation Act, 1957, in the case of non-industrial hereditaments. The relief given by section 8 of the Act of 1955 is not therefore in the nature of special treatment, since similar relief is being widely granted all round. This provision, therefore, in favour of non-profit-making organisations should be widely interpreted.

Sir Arthur Comyns Carr Q.C. and *Charles Scholefield* for the respondents. The provision in the Act of 1955 was passed to deal with the anticipated situation that sympathetic assessments might be lost by charities; Parliament was regarding the concept of the " charitable " in its popular sense. Such charities would be hit both by the withdrawal of sympathetic assessments and by the concessions to householders in the Act of 1953. Section 8 should have a restricted construction; otherwise a heavier burden would be thrown on shops and other premises which were not derated.

Looking at the matter broadly, section 8 of the Act of 1955 is extraordinarily vague and hard to construe. As to the construction of statutes, see *Nash* v. *Hollinshead.*[11] The fact that the legislature mentions one thing which is covered already and another which is not covered already does not affect the construction. If the scope of " social welfare " in this section were unlimited, every club would be within it because every club provides some sort of social welfare. If the " Shoreditch Lambs " are to be included, there is nothing to exclude the bishops in the Athenaeum.

On the question whether the society is carried on for profit, *New York Life Insurance Co.* v. *Styles* [12] does not help the appellants: see *per* Lord Bramwell and Lord Herschell.[13] See also *Liverpool and London and Globe Insurance Co.* v. *Bennett.*[14] The investments here are not incidental or merely convenient, but in the case of an insurance company or a friendly society of this sort the enterprise could not be carried on without investments. Accordingly, a main object here is to make a profit, since the ends of the society could not be achieved without it.

As for the words " main objects are charitable," it is only partly true to say that the words destroy the effect of the income tax cases which require the objects of a charity to be exclusively charitable: see *Berry* v. *St. Marylebone Borough Council* [15] and

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[11] [1901] 1 K.B. 700, 706; 17 T.L.R. 352.

[12] 14 App.Cas. 381.

[13] Ibid. 395, 409.

[14] [1913] A.C. 610; 29 T.L.R. 757.

[15] [1958] Ch. 406, 414, 420.

General Nursing Council for England and Wales v. *St. Marylebone Borough Council*,[16] which indicates that the advancement of social welfare imports an organisation for the spread of social welfare—a devotion to good works. Here the members conduct an organisation to benefit themselves; it does not benefit the public.

The fact that one has here the expression "charitable or "otherwise" does not make it any harder to apply the ejusdem generis rule than if there were three or four words from which to spell out the common quality which was their genus. Having only one word saves the trouble of spelling out the genus. As to the words "or otherwise," see *Attorney-General* v. *Seccombe*,[17] *Rex* v. *Special Commissioners of Income Tax, Ex parte Shaftesbury Homes and Arethusa Training Ship* [18] (in which the previous case was not cited) and *Stag Line Ltd.* v. *Foscolo Mango & Co. Ltd.*[19] See also *British Launderers' Research Association* v. *Hendon Rating Authority* [20] and *Dunne* v. *Byrne*.[21] To qualify for relief, a body must include an altruistic or eleemosynary element in its main objects.

This body exists for promoting the welfare of its members, only those up to date with their subscriptions. That cannot be described as "*social* welfare." It is in contrast with the "Wel-"fare State" where everybody is in. If this were "social," everyone would be within the section. As to the societies which are entitled to be registered under the Friendly Societies Act, 1896, see section 8 of that Act. There is no justification for limiting the enactment of 1955 to the working classes. "Social" is a very imprecise word. One has to guess from the context the sort of thing which was meant to be included in the scope of the Act. The word suggests the idea of public benefit. It implies good works. Anything not for the public benefit is outside it. The word "advancement" is also vague, but it must add something more to the enactment than the mere idea of the provision of benefits. Merely to provide mutual insurance benefits such as this society provides does not advance social welfare.

As to the meaning of "working classes," see *H. E. Green &*

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[16] [1958] Ch. 421, 432, 436; [1957] 3 W.L.R. 1039; [1957] 3 All E.R. 685.

[17] [1911] 2 K.B. 688, 702–703.

[18] [1922] 2 K.B. 729; 38 T.L.R. 860; (C.A.) [1923] 1 K.B. 393; 39 T.L.R. 99.

[19] [1931] 2 K.B. 48, 65 et seq., 73; 47 T.L.R. 278; (H.L.) [1932] A.C. 328, 334, 338, 345; 48 T.L.R. 127.

[20] [1949] 1 K.B. 434.

[21] [1912] A.C. 407; 28 T.L.R. 257.

Sons v. *Minister of Health.*[22] Schedule I to the Housing Act, 1949, removed all references to the "working classes" from the Housing Act, 1936, and the idea should not be brought back into a modern Act by a side wind.

As to the word "advancement," see *Income Tax Commissioners* v. *Forrest*,[23] *per* Lord Watson, and *Chartered Insurance Institute* v. *London Corporation*,[24] *per* Devlin J.

Charles Scholefield following. For 20 years there has been no general revaluation for rating purposes, but by legislation before 1945 many hereditaments were wholly or partly exempted from rating. By the Act of 1953 dwelling-houses were linked to 1939 values. In 1955 few hereditaments were fully rated. Rating is different from income tax because the local authority always gets the same amount of money, so that, if some hereditament escapes, the local authority does not get less, but the burden falls on other ratepayers. Therefore exemptions should be carefully scrutinised.

The privileges of charities should be restricted to purposes which benefit the public: *In re Hobourn Aero Components Ltd.'s Air Raid Distress Fund.*[25] If this claim were allowed, it would not stop at the convalescent home but would go on to the head offices too, and the whole burden would be put on other ratepayers: see what Parker L.J. said in this case in the Court of Appeal.[26]

The words "or otherwise" were meant to bring in objects of general public utility which were not charities. *National Anti-Vivisection Society* v. *Inland Revenue Commissioners*[27] shows that not everything beneficial to the public is charitable. This section was meant to bring within the rating privileges objects beneficial to the community in the same way that a charity is beneficial to the community, even if it was not technically a charity. The section was not intended to open a wide door.

The expression "welfare" could have stood alone without the word "advancement" unless it was intended to limit it. The "advancement" of religion means advancing it as a whole rather than practising any particular rites. So with "social "welfare"; it is collective; one cannot have the social welfare of an individual any more than one can have the national prosperity of an individual. Social welfare can be limited territorially (to a town) or to a vocation (railwaymen), but the customers of, say, Barclays Bank are not a community; they only have a personal nexus to a particular body: see the *Hobourn* case.[28] The Cavalry Club is not charitable because it is not a section of the community, nor is a City luncheon club. In both cases the organisations are not based on any principle recognised by charity law.

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[22] [1948] 1 K.B. 34, 38; [1947] 2 All E.R. 469.

[23] (1890) 15 App.Cas. 334, 344–345; 6 T.L.R. 456.

[24] [1957] 1 W.L.R. 867, 875; [1957] 2 All E.R. 638.

[25] [1946] Ch. 194, 208–209; 62 T.L.R. 313; [1946] 1 All E.R. 501.

[26] [1957] 2 K.B. 573, 581; [1957] 3 W.L.R. 550; [1957] 3 All E.R. 119.

[27] [1948] A.C. 31, 41; 63 T.L.R. 424; [1947] 2 All E.R. 217.

As to the connection between "social welfare" and social services, service is the supply of a particular need. This society does not look at the needs of people, but at their deserts. Social welfare should look at their needs.

Baddeley's case[29] is distinguishable.

John Pennycuick Q.C. in reply. The expression "for profit" in section 8 means "with the purpose of making a profit." From rule 2 of the society's rules it appears that it is established and conducted for mutual insurance and not for making a profit. It is not one of its objects to have an income from investments; that is merely incidental; it must be so where the society has no power to distribute its profits in dividends. *New York Life Insurance Co.* v. *Styles*[30] is relied on.

In the construction of this Act one must look at the circumstances in which it was passed, for example, the former "sympathetic assessments." There is here a wide but transitional relief from rates.

The respondents relied on the words "or otherwise" to support the application of the ejusdem generis rule, but here there is nothing to cut down by reference to the law of charities. It is not necessary that some eleemosynary or altruistic element must be present in the main objects of the organisation if it is to qualify for relief under section 8. Social welfare by no means includes everything which has been held charitable as being beneficial to the community: see Halsbury's Laws of England, 3rd ed., vol. IV, p. 226, para. 506. Social welfare would not include teaching shooting or promoting the welfare of animals, which have both been held to be charitable. Some objects fall into one category of charity but not into another. There is no difficulty, on the appellant's construction of section 8, in giving a meaning to every word in it; there is no need to write in anything. Admittedly the objects of this society are not eleemosynary.

[28] [1946] Ch. 194, 203–204, 206, 207.

[29] [1955] A.C. 572.

[30] 14 App.Cas. 381.

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The word "advancement" does not suggest an end in itself: see *Forrest's* case.[31] The "advancement" of education in a charitable context includes both the science of education and making people educated. The "advancement" of religion includes making people more religious. Any organisation is concerned with the "advancement" of education within section 8 if it is concerned with the advancement of education within the first head of the classification of charities apart from the public element. In the case of the *Chartered Insurance Institute*[32] Devlin J. was referring to the practical education of training the mind. The "advancement" of education cannot be so limited as to exclude making people educated, actually educating them; so, too, with the "advancement" of social welfare.

"Welfare" is a word of the widest import. The addition of the word "social" cannot indicate that it must be within the reach of every person or of every person in an industry or geographical place. The expression is appropriate to indicate the benefit of wage earners as a whole as affected by this particular society. Save from the point of view of charity law, there can be no reason to limit this expression. "Social welfare" is not the equivalent of "public benefit." Thus one can speak of "social welfare" in relation to the employees of a particular company. The expression is not restricted to objects which have a public benefit in the charitable sense. "Social welfare" does not have to be provided from outside. The expression indicates a particular state or condition among those who are made socially well. This cannot be distinguished from the promotion of the social welfare of a class. One must put aside the artificial conceptions of the law of charity. "Social welfare" connotes some connection with the lower income groups. It is sensible to have a trust for social welfare among seamen but not for admirals, or for a company's weekly wage earners but not for directors. But that is an issue not raised in this case.

As to the effect of the findings of fact in the case stated, see section 25 of the Supreme Court of Judicature (Consolidation) Act, 1925. The facts found are not conclusive against the appellants.

Sir Arthur Comyns Carr Q.C. referred to *United Grand Lodge of Ancient, Free and Accepted Masons of England* v. *Holborn Borough Council*[33] on the question of the "advancement" of religion, and to *British Launderers' Research Association* v. *Hendon Rating Authority*[34] and *Cababé* v. *Walton-on-Thames Urban District Council*[35] as to the effect of the conclusions of fact in a case stated.

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[31] 15 App.Cas. 334, 351.

[32] [1957] 1 W.L.R. 867.

[33] [1957] 1 W.L.R. 1080; [1957] 3 All E.R. 281.

Their Lordships took time for consideration.

June 25. LORD KEITH OF AVONHOLM. My Lords, this appeal arises out of a demand made by the respondents on the appellants for a rate for the year beginning April 1, 1956, amounting to £1,983 4s., in respect of their occupation of a convalescent home situate at Skegness. The appellants appealed to quarter sessions against that rate on the ground that they had not been allowed the relief to which they claimed they were entitled under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The rate charged in respect of the said premises for the year ending March 31, 1956, was £786 10s., and the appellants claimed that no higher rate should be charged for the following year.

It will be convenient to set out the material portions of section 8 so far as they may affect the issue between the parties: "(1) This section applies to the following hereditaments, that is "to say:—(*a*) any hereditament occupied for the purposes of an "organisation (whether corporate or unincorporate) which is not "established or conducted for profit and whose main objects are "charitable or are otherwise concerned with the advancement of "religion, education or social welfare; (*b*) any hereditament held "upon trust for use as an almshouse; (*c*) any hereditament "consisting of a playing field (that is to say, land used mainly or "exclusively for the purposes of open-air games or of open-air "athletic sports) occupied for the purposes of a club, society or "other organisation which is not established or conducted for "profit and does not (except on special occasions) make any "charge for the admission of spectators to the playing field: "Provided that this section shall not apply to any hereditament "to which section 7 of this Act applies, or to any hereditament "occupied by an authority having, within the meaning of the "Local Loans Act, 1875, power to levy a rate. (2) For the "purposes of the making and levying of rates in a rating area, "for the year beginning with the date of the coming into force of "the first new valuation list for that area (in this section referred "to as 'the first year of the new list'), and for any subsequent "year, the amount of rates chargeable in respect of a hereditament

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[34] [1949] 1 K.B. 434, 471.

[35] [1914] A.C. 102.

"to which this section applies shall, subject to the following "provisions of this section, be limited as follows, that is to say:— "(*a*) for the first year of the new list, the amount so chargeable "shall not exceed the total amount of rates (including any special "rates) which were charged in respect of the hereditament for the "last year before the new list came into force. . . ."

It is sufficient to say that the first year of the new list was the year beginning April 1, 1956.

The appellants' claim is that their convalescent home is a hereditament qualified for relief under that section.

[His Lordship stated the facts and continued:] The contention of the appellants is that their society is not established or conducted for profit, and that it is an organisation whose main objects are concerned with the advancement of social welfare. It is common ground that it is not a charitable organisation.

Differing views have been expressed by the judges who have considered this case. Lord Goddard C.J. doubted whether the society was not conducted for profit but found it unnecessary to go into that. His view was that the main object of the society was to carry on an insurance business and that that was not social welfare. Lynskey J., while agreeing with Lord Goddard, thought that "social welfare" in its context with "charitable" connoted an eleemosynary idea, and that it could not be said of a body providing benefits on an actuarial basis to its members that its main purpose was of an eleemosynary effect for the purpose of the business carried on.

The Court of Appeal considered that the earning of profits was purely incidental to the society's business, and that it was not established or conducted for profit. As the exemption from rates was at the expense of the general body of ratepayers it would be right, they thought, in the case of any doubt, to give the words of the provision a restricted meaning. The court thought that,[1] unless some restriction could be implied from the context, "the "provision of benefits which tends directly to improve the health "or conditions of life of individuals comes prima facie within the "expression 'social welfare.'" They found such a restriction in the words "objects concerned with the advancement of . . ." which they read as requiring the advancement of social welfare as an end in itself or for its own sake. The Court of Appeal also agreed with Lord Goddard that it was remarkable, if Parliament had intended friendly societies to have special treatment with regard to rates, that it should not have said so in plain terms, as in some of the taxing statutes.

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[1] [1957] 2 Q.B. 573, 581; [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199.

My Lords, these views were canvassed very fully in the course of the hearing of this appeal. Other submissions were also put forward from one side or the other on what, in their context, the words "social welfare," or "the advancement of social welfare," or "objects concerned with the advancement of social welfare" were apt to cover. These I shall refer to later, but first I turn to the question whether the appellant society is an organisation established or conducted for profit.

The society may, I think, quite properly be described as a mutual insurance organisation set up to provide benefits for its members in the various mischances of illness, disability and old age that may befall them during membership, and to afford them an opportunity of taking out whole life assurances, endowment assurances and old age annuities for themselves, and certain other defined types of insurance. A man might, in a sense, provide similar benefits for himself without joining any society by setting aside and investing a lump sum, or annual amounts, to accumulate with interest and to provide a nest egg against some emergency, or contemplated event although such a scheme would be inadequate against unexpected early illness or death. The interest earned would necessarily be subject to tax but it could not, in my opinion, be said that he was engaged in earning a profit, or in setting up a profit-earning scheme. The accumulated sum is capital belonging to the person concerned. There are obvious advantages in joining with some 700,000 others to provide against such contingencies on a mutual basis and the mutual organisation does not take on the character of a profit-making organisation by the mere addition of numbers. This was, in my opinion, the ratio of the decision of this House in *New York Life Insurance Co.* v. *Styles*,[2] which is, I think, conclusive on this point. The Court of Appeal thought that profits, or something in the nature of profits, were earned by the society for its members, but that this was purely incidental to the purpose for which the society was formed, and that it could not be said that it was established or conducted for profit. It may well be that on change of its investments the society on some occasions realised a capital appreciation just as on other occasions it may have suffered a capital loss. But it was not trading in its investments and the position in the case of this mutual society does not seem to me to be different in any way from what it would be in the case of a single individual. The society holds very large investments which earn large sums of interest and rents. These are, no doubt, profits and gains within the meaning of the Income Tax Acts, though they may be exempt from tax, but, in my opinion, the existence of these investments does not make the society an organisation "established or conducted for profit" within section 8 of the Act of 1955. If it were otherwise many charitable organisations holding investments would be cut out of the benefit of the section.

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[2] (1889) 14 App.Cas. 381; 5 T.L.R. 621.

The argument for the appellants on the second limb of the section is very simple. The protection afforded through the benefits provided by the society to its members is, it is said, a species of social welfare and the objects of the society are concerned with the advancement of this type of social welfare. Reliance was placed upon certain words used by Lord Tucker in *Inland Revenue Commissioners* v. *Baddeley*,[3] with reference to the phrase "the promotion of social well-being." This phrase, said Lord Tucker, "would appear to cover many of the activities "of the so-called 'welfare State' and to include material benefits "and advantages which have little or no relation to social ethics "or good citizenship, concepts which are themselves not easily "definable." Further, it was submitted that nothing turned on the introduction of the word "advancement." It meant no more than being concerned with religion, education or social welfare. For instance, any organisation is concerned with the advancement of education which is concerned with instruction or education. So the advancement of social welfare includes making people socially well, at least where it is sought to attain that end among people in the wage-earning class, as here. No distinction can be made between the advancement of social welfare and the provision of the social welfare of a class. On the other side, it was said that advancement of social welfare involves the conception of an organisation for the spread of social welfare, of devotion to good works, as suggested by Lord Evershed M.R. in *General Nursing Council for England and Wales* v. *St. Marylebone Borough Council*,[4] of some propagation or encouragement of social welfare from the outside on altruistic grounds, or motivated by Good Samaritan principles.

It was pointed out, and accepted by both sides, that it had been the practice of rating authorities prior to the passing of the Act of 1955 to make sympathetic assessments on charitable organisations as a matter of grace and that the Local Government Act, 1948, transferred the duty of making valuations to the valuation officers of the Inland Revenue as from April 1, 1956, and so deprived the local rating authorities of making sympathetic assessments in the case of charitable organisations. These sympathetic assessments had been freely made not only on charitable organisations in the strictly legal sense but on charitable organisations in the popular sense. The Valuation for Rating Act, 1953, had provided by section 2 that houses, private garages and private storage premises should be rated at 1939 values for the first valuation list after March 31, 1956. This meant that other premises, including those of associations not being carried on for profit, would be very badly hit by the new and greatly increased valuations. Accordingly the relief under section 8 of the Act of 1955 was introduced. Thus, it was suggested by the appellants' counsel, this section should be given a liberal interpretation in favour of non-profit making organisations. A subsequent statute, the Rating and Valuation Act, 1957, was passed to meet the situation by giving relief in the shape of a deduction of one-fifth of the net annual value of all non-industrial hereditaments, but this, in my opinion, is irrelevant on the point of the construction of the Act of 1955. The respondents, on the other hand, relied on the legislation of 1953 as supporting the view that section 8 should be given a restricted construction, as otherwise shops and other premises that were not derated and did not come under the relief of section 8 would be the more heavily burdened.

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[3] [1955] A.C. 572, 613; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525.

[4] [1958] Ch. 421, 436; [1957] 3 W.L.R. 1039; [1957] 3 All E.R. 685.

My Lords, the scope of section 8 of the Act of 1955 is, in my opinion, difficult of precise definition. It would, I think, be unsafe to venture on any definition or delimitation for the purposes of the present case. The varieties of organisations to which the terms of the statute may be thought to apply are infinite and each case must, in my opinion, be considered on its own merits. Some of the suggested criteria or tests advanced by counsel for the parties may be helpful in certain cases, but I am not satisfied that they are exhaustive. If I may venture on a general observation, it is that the words " or are otherwise concerned with the " advancement of religion, education or social welfare " indicate that the section is concerned with objects which are also the concern of charitable organisations but which for some reason or other may fail to come under the definition of " charitable " purposes " in the strictly legal sense. Some organisations, prior to 1955, which were charitable in the popular rather than in the legal sense, seem to have been given sympathetic assessments by rating authorities. On the other hand, the section shows that the objects of an organisation need not be wholly charitable. It is sufficient if its main objects are charitable, but that leaves it open, if its main objects are not charitable in the legal sense, to say that they are concerned with the advancement of religion, education, or social welfare. I attach some importance to the words "concerned with the advancement of," as did also the Court of Appeal. These words import, I think, some limitation on the words which follow. It would have been very simple otherwise to have said "are otherwise concerned with religion, "education, or social welfare." But whatever width may be given to the words of section 8 (1) of the statute, I find myself unable to hold that an organisation like that of the appellants, formed for the mutual assurance of members admitted on a selective basis, albeit described to us as members of the lower wage-earning class, can be described as an organisation whose main objects are concerned with the advancement of social welfare. The benefits provided are benefits provided by the members for themselves. The desire for protection in time of need is the common bond that has brought them together. That is a most laudable object, but I find it impossible to distinguish their organisation in any essential respect from any mutual insurance society which provides similar, if more enlarged, benefits for a wider and more diverse cross-section of the community.

I would dismiss the appeal. The costs of the appeal must be borne by the appellants.

LORD MACDERMOTT. My Lords, the appellants are the owners and occupiers of a convalescent home in Skegness in respect of which they claim to be entitled to the measure of rating relief provided by section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. To make good their claim the appellants must bring the home within the description contained in subsection (1) (*a*) of that section, which reads as follows: [His Lordship read the enactment and continued:] The appellants are the trustees of the National Deposit Friendly Society. This society has been registered under the Friendly Societies Acts since 1872. It has some 700,000 members and its objects are, in the words of the appellants' written case, ". . . to provide on a "mutual basis for pecuniary benefits of relatively small amounts "to be paid to its members upon the ordinary chances and changes "of human life such as relief during sickness, provision of facilities "in convalescent homes, old age pay and payments to a member's "family in the event of his death." The society also has an assurance section providing on a mutual basis for whole life and endowment assurances for the benefit of members.

The subscriptions received from members and the income of the society's substantial investments are applied to the provision of benefits, and the amount of each member's subscription is calculated on an actuarial basis to ensure that the society's income is enough to provide the benefits prescribed by its rules. These benefits are not available to anyone who is not a member of the society. Admission to ordinary, that is, to benefit membership, is at the discretion of the committee of management, who must be satisfied regarding the age, health, character and occupation of the applicants. Each member is entitled to interest at 2½ per cent. per annum on the amount standing to his credit with the society, but apart from that and the prescribed benefits no dividend or share of income is payable to members.

The home in question is provided by the society for its members and the use of it is one of the benefits referred to in the rules. Nothing, however, turns on the actual nature of this user. The society has many properties in different parts of England and if the appellants are right in their present contentions, the relief they now claim must extend far beyond the premises they hold for convalescent purposes.

If the rated property is to come within section 8 (1) (*a*) of the Act of 1955 three conditions have to be fulfilled—first, it must be a hereditament occupied for the purposes of the society; second, the society must be an organisation which is not established or conducted for profit; and third, the society's main objects must be charitable, or "otherwise concerned with the advancement "of religion, education or social welfare."

Of these requirements the first is clearly satisfied. The second has been a matter of controversy throughout the litigation, but Quarter Sessions found and the Court of Appeal held that the society was not established or conducted for profit. As at present advised, I am not disposed to differ from that view, but I do not need to express a final opinion upon it and I shall therefore refrain from doing so and proceed on the assumption that this condition, too, is fulfilled. Coming to the third condition, the issue is further narrowed by certain concessions which the appellants have made, namely, that the main objects of the society are neither charitable nor otherwise concerned with the advancement of religion or education, and also that the words "advancement "of" apply to "education" and "social welfare" no less than to "religion." There can be no question as to the propriety of these concessions and the point left for determination, accordingly, is whether in law the main objects of the society are "other-" "wise concerned with the advancement of . . . social welfare."

My Lords, "social welfare" is, on any view, a wide and difficult expression. The Court of Appeal[5] regarded "welfare" as denoting a "state of being well, whether in the physical, mental "or material sense" and, founding on what Lord Tucker said in *Inland Revenue Commissioners* v. *Baddeley*,[6] respecting the phrase "the promotion of social well-being," thought that, apart from any restriction to be implied from the context, "the provision of "benefits which tends directly to improve the health or conditions "of life of individuals comes prima facie within the expression "'social welfare.'" On consideration I must confess to having some doubt as to whether that conclusion may not go too far. Though I am not sure that this expression has as yet gained a settled primary sense, I would hesitate to regard it as synonymous with "social well-being." That phrase may be employed to describe a state of comfort and plenty, but "social welfare" seems to me to savour, at present anyway, more of those needs of the community which, as a matter of social ethics, ought to be met in the attainment of some acceptable standard. It is, however, unnecessary for me to reach a decision respecting the true import of "social welfare" in this case and, in the circumstances, it is perhaps better not to make the attempt. Instead, I shall assume for the purposes of this opinion, and in favour of the appellants, that the expression is, in itself, apt as a comprehensive description of the society's main objects.

On this assumption the next question is whether the context nevertheless excludes the appellants' premises from section 8 (1) (*a*). I am satisfied that it does. I find it impossible to regard paragraph (*a*) as referring to two categories of main objects—the one charitable, the other not—which have no feature or quality in common. The purpose of the paragraph—to provide a basis for the relief of certain ratepayers at the expense of others—makes some worthy attribute which will pervade both categories a likely requirement. From the language which Parliament has used it seems to me that the paragraph provides for this and makes it necessary for every object that comes within it to have a common and commendable quality. Though the objects which constitute the second category—"the advancement of religion,

[5] [1957] 2 Q.B. 573, 581.

[6] [1955] A.C. 572, 613.

"education or social welfare"—are not charitable, there can be no doubt that they are akin to what is charitable and have been intentionally described as such; there is nothing in their description incompatible with charity and if they fall outside what is charitable it is not because they are in conflict with the legal concept of charity, but because they lack some one or more of its characteristics. But perhaps the clearest indication of a common factor is the use of the word "advancement" in the second category. It is a word which has long been associated with charitable purposes, particularly in relation to religion and education, and it stands for something of importance in what is legally charitable. Its insertion in the non-charitable category seems to me to indicate the existence of a close link between the categories and to be difficult to explain on any other basis.

The same purposeful word, in my opinion, also indicates the nature of this link. In *In re Cranston, Webb* v. *Oldfield*,[7] FitzGibbon L.J. said this: "The essential attributes of a legal "charity are, in my opinion, that it shall be *unselfish*—i.e., for "the benefit of other persons than the donor—that it shall be "*public*, i.e., that those to be benefited shall form a class worthy, "in numbers or importance, of consideration as a public object "of generosity, and that it shall be *philanthropic* or *benevolent*—"i.e., dictated by a desire to do good."

My Lords, what FitzGibbon L.J. said by way of defining the public nature of a charity may be open to review in the light of the decision of this House in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*,[8] but there can be no doubt that unselfishness and benevolence are still of the essence of legal charity. That is not to say, and I do not think FitzGibbon L.J. meant to suggest, that the unselfish element must be absolute in the sense that what would otherwise be charitable will fail to be so if its founders or promoters incidentally take some degree of benefit. The principle, as I understand it, is that a valid charity must be substantially altruistic and benevolent in its purposes. That quality, which is, of course, but one facet of legal charity, appears to me to be reflected in the word "advancement" as used in the paragraph in question, for there it seems clearly to be used as it is commonly used in relation to what is charitable, and, so used, I think it must be construed as implying a desire to do good to others.

If, then, as I would hold, that is the nature of the quality which links and runs through the categories mentioned in section

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[7] [1898] 1 I.R. 431, 446.

[8] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

8 (1) (*a*), it remains to inquire whether the objects of the society possess or lack this quality. In my opinion, they lack it. That they promote the well-being of the society's members may be taken for granted, but that is not the test. The society's benefits are provided for and confined to its subscribing members and are enjoyed by them, not incidentally or by the side of some wider, dominating purpose, but because such benefits are the whole aim and object of the association for mutual benefit which the society is. It is the private interests of its own subscribing membership that the society promotes and, admirable as that may be, it cannot be considered as in any relevant sense an altruistic activity. For this reason I am of opinion that, whatever "social welfare" may be, the objects of the society are not concerned with its "advancement" within the meaning of section 8 (1) (*a*).

I would therefore affirm the decision of the courts below and dismiss the appeal.

LORD SOMERVELL OF HARROW. My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack. The words used are general, and I agree it would be unsafe, and I think also it would be impossible, to find some definition in other words which would be of assistance in subsequent cases. This is not one of those rare cases, as my noble and learned friend implies, in which assistance can be got from other cases in which the courts have had to construe and apply different words from those under consideration.

LORD DENNING. My Lords, in order to understand section 8 of the Act of 1955 it is as well to know the background against which it was enacted. It is legitimate for this purpose to take notice of matters generally known to well-informed people. The background here—as both counsel agree—is that previously, in the days when the local authorities were entrusted with the task of assessing the value of properties, they used to make "sympathetic" assessments. If they thought that an organisation was deserving of some relief from the burden of rates, they used to make a very low, even a nominal, assessment of the value of its property: so that when the rate was afterwards made by the rating authority, at so many shillings in the pound, the sum payable by the deserving organisation was very small. There was no statutory authority for this practice. It was just done and nobody objected, because it was in a good cause. By recent enactments, however, Parliament has taken away from the local authorities the task of assessing the value of properties and has entrusted it to the valuation officers of the Commissioners of Inland Revenue. These officers have to assess values on uniform standards—applicable over the whole country—without favour or sympathy for anyone. This has meant a great increase in the values placed on the properties of these deserving organisations: and if they were called on to pay the full rate, at so many shillings in the pound, on these new assessments, they would have to pay far more than they used to do: and the effect of the sudden change on their finances might well prove disastrous. In order to help these deserving organisations over this difficulty, Parliament enacted section 8 of the 1955 Act, which provides that for the first year they should not have to pay more than they did before, and that for the following three years at least they should only have to pay on a reduced basis. Full rates, however, will become payable if the local authority give three years' notice to that effect. Over and above this temporary assistance, Parliament, by the self-same section, has given the local authorities a permanent discretion to help these deserving organisations by reducing or remitting the rates payable by them. It is, therefore, a question of great importance to an organisation to know whether it comes within the deserving category or not. Hence the many cases now coming before the courts.

Section 8 is framed very widely, no doubt because Parliament intended that local authorities should be able to do much as they had done in the past—to give relief from rates where they considered it to be deserved: but at the same time Parliament did intend to lay down some limits to the organisations which could be considered deserving, as otherwise there might be undue variation between one rating area and another.

In applying section 8 (1) (*a*) the first thing to notice is that it covers "*any* hereditament occupied for the purposes" of the deserving organisation. Our present case happens to concern a convalescent home at Skegness, but the question for consideration would be just the same if we were considering the head office of the society in Buckingham Palace Road. If the convalescent home is entitled to statutory relief from rates, so are the commercial offices of the society.

In order to qualify for the benefit of the section, the society must be an organisation "which is not established or conducted "for profit."

I have no doubt that this society was not "established" for profit. Like other friendly societies it was, no doubt, established to encourage thrift among people of small means. Rule 2 (1) shows that its object was to enable its members, by the pooling of their contributions, to establish a common fund or funds, out of which they would receive relief during sickness, medical benefit, old age pay, and money to be paid on death. Rule 2 (2) shows that, if there was any surplus due to a member—after providing for the benefits—the society was to accumulate it at interest for him. The society was, therefore, in its inception, very like a simple mutual insurance association in which a group of individuals pay premiums representing their share of the estimated " risk ": and at the end of the year any surplus is returned to them or applied in reduction of the next premiums. Such an association, so long as it is conducted on that basis, does not make profits, see *New York Life Insurance Co.* v. *Styles*.[9] The basis of that decision, as I understand it, is that the surplus is returned to the contributors, or at any rate credited to them.

But has the society, in the course of its history, changed its character? Is it now " conducted for profit "? It is not a small group of individuals. It has 700,000 members. Although it is not an incorporated body, it is a legal entity—or at any rate so like one that I doubt whether anyone can tell the difference, see *Longdon-Griffiths* v. *Smith*,[10] *Bonsor* v. *Musicians' Union*.[11] The largest section of its undertaking is the deposit section, which is conducted in this way: the members pay contributions to the society, out of which it pays the sickness and other benefits. Any surplus is credited to the members' deposit accounts. But many members, in addition to their contributions, often make direct payments into their deposit accounts. These direct payments amount in all to very large sums. The deposit accounts carry interest at 2½ per cent. and can be withdrawn on notice. The society invests the contributions and deposits in authorised investments. In making these investments the policy of the society " is to choose investments " which offer the highest return of income consistent with " security of capital . . . no member receives any dividend or " share of income other than interest at 2½ per cent. on moneys " standing to the credit of his deposit account and such sickness " or other benefits as are provided by the said rules." And it is to be noticed that the society does not have to pay any income tax, see section 440 (1) of the Income Tax Act, 1952.

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[9] 14 App.Cas. 381.

[10] [1951] 1 K.B. 295, 299; 66 T.L.R. (Pt. 2) 627; [1950] 2 All E.R. 662.

[11] [1956] A.C. 104; [1955] 3 W.L.R. 788; [1955] 3 All E.R. 518.

This policy of the society has yielded impressive results. The members' balances (representing the money due to them by the society, including accrued interest) stand at some £14 million. But the society's investments stand at some £22 million (which bring in an income of £880,000 a year). The society has, therefore, the very substantial reserve of some £8 million. This reserve is credited in the accounts, as to £5½ million to the sickness reserve fund, and £2½ million to the death benefit fund. It may well be asked: How has this vast reserve accumulated unless it be from profits made by the society on its investments? It does not require much imagination to suggest that it has received 4 per cent. or 5 per cent. on its investments (free of tax) and paid out only 2½ per cent. to its members. This is a far cry from a simple mutual insurance association which in fact returns any surplus to its members. It is far removed, too, from the complicated mutual insurance corporations of today which in theory—but not in reality—return surpluses to contributors, see *Faulconbridge* v. *National Employers' Mutual General Insurance Association Ltd.*[12] and the Report of the Royal Commission on Taxation of Profits, paragraphs 589 and 590. None of those mutual associations has anything corresponding to the deposit section of this society.

Looking at the way in which the society has conducted its affairs, I am of opinion that it has made profits. It has not distributed those profits like a commercial company. Nor has it returned them to members. It has used them to build up large and accumulating reserve funds. But the fact that the society has made profits does not mean that it is "conducted "for profit," which I take to mean "conducted for the purpose "of making profit." Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for profit. The reason is because their objects are to advance education or religion, as the case may be. The investing of funds is not one of their objects properly so called, but only a means of achieving those objects. So here it seems to me that if the making of profit is not one of the main objects of an organisation, but is only a subsidiary object—that is to say, if it is only a means whereby its main objects can be furthered or achieved—then it is not established or conducted for profit, see *Reg.* v. *Whitmarsh,*[13] *Bear* v. *Bromley.*[14] Applied to this case, I think that the building up of a reserve fund—despite its size—is not one of the main objects of this society. It is only incidental—a consequence of the wise investment policy it has pursued. The main object of the society is to provide security for people of small means against the risks which life holds for them—and not to make a profit therefrom. It is therefore not conducted for profit.

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[12] (1952) 33 T.C. 103, 125–126.

The next thing that is necessary, in order to enable the society to qualify for the benefits of section 8 is that its " main objects are " charitable or are otherwise concerned with the advancement of " religion, education or social welfare."

It is quite plain that by those words Parliament intended to extend the benefit of the section beyond the field of legal " charities." In law " charitable " is a term of art with a technical meaning which is narrower than its popular meaning. In this section Parliament intended to expand the technical meaning so as to embrace a wider group of deserving organisations.

Thus Parliament does not limit the organisations to those whose objects are " exclusively " or " only " of a particular character, as it has done in some statutes. It is sufficient if the " main objects " of the organisation—which I take to mean all of its main objects as distinct from its subsidiary objects—are of that character. For instance, a scientific institute would qualify for the benefit of the section if its main object was the advancement of education even though it had, as a subsidiary object, the purposes of its members. But in order to ascertain the " main " objects " of an organisation, you are entitled, I think, to look not only at its rules but also to consider the way in which it has conducted its affairs. If you should find, for instance, that a scientific institute—which was formed primarily for the promotion of science—has been so conducted that the advancement of the interests of its members has become one of its main purposes—as distinct from being merely subsidiary to the advancement of education—then it would cease to qualify for the benefits of the section: see the case of *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.*[15] by Lord Reid.

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[13] (1850) 15 Q.B. 600.

[14] (1852) 18 Q.B. 271.

[15] [1952] A.C. 631, 661; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.

H. L. (E.)
1958

NATIONAL DEPOSIT FRIENDLY SOCIETY TRUSTEES *v.* SKEGNESS URBAN DISTRICT COUNCIL.

Lord Denning.

Again, Parliament does not limit the benefit to those organisations whose main objects are "charitable." It extends the benefit to those whose main objects are "otherwise concerned "with the advancement of religion, education or social welfare." This is a considerable extension on "charities" but is it an unlimited extension?

The principal question in this case, it seems to me, is whether, in order to obtain the benefit of the section, the main objects of the organisation must be directed to the public benefit rather than to the private benefit of the individuals who make up the organisation. Mr. Pennycuick argued that the words were so wide as to eliminate any necessity for public benefit. He laid stress on the words "or otherwise." He pointed to the words "the advancement of religion, education" in the section and said that trusts for those purposes are "charitable" if they are directed to the public benefit. If the words "or otherwise" are to be given any effect, he said, in regard to religion and education —over and above "charitable"—they must bring in organisations which are not directed to the public benefit. I cannot agree with this contention. I think the words "charitable or otherwise" give a colour, so to speak, to all the words that follow after them. The section cannot be read as if those words were left out—as if the only question were whether the main objects are "concerned "with the advancement of religion, education or social welfare." The main objects which are "otherwise" concerned must, I think, be objects that are akin to charitable objects—have some kindred quality with charitable objects. That is how Lord Buckmaster approached a similar problem in *Stag Line Ltd.* v. *Foscolo Mango & Co. Ltd.*[16] and I would approach the problem in the same way.

What, then, are the ways in which the main objects must be akin to charitable objects? The one thing that distinguishes charitable objects from all others is that they are for the good of the community, that is, for public rather than for private benefit: and, in order to qualify an organisation for the relief given by the section, there must be present, I think, the concept of public benefit—wider, no doubt, than the somewhat limited interpretation put on it in the charity cases—but still it must be present. For this purpose the main objects must be altruistic—must be concerned with doing good for others rather than for yourself—for others, that is, who are outside your own circle of relatives and friends and to whom you are under no personal obligation. There is no need under this section to canvass the cases on what constitutes a section of the community for "charitable" purposes, such as *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*[17] and *Inland Revenue Commissioners* v. *Baddeley*,[18] in which there was a divergence of opinion among the judges. Suffice it to reach a conclusion on a general survey of the circumstances.

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[16] [1932] A.C. 328, 334; 48 T.L.R. 127.

I am confirmed in this view by the other words in the section. Take the word "advancement" as used in the phrase "advancement of education." The word "advancement" connotes, to my mind, the concept of public benefit. When a man teaches his own children their lessons, he is not concerned with the "*advancement* of education" but solely with the "education" of his children. But when a schoolmaster teaches the boys in a public school, he is concerned—with their education truly—but also with the "advancement of education" generally. I would not myself confine the "advancement of education" to the advancement of education as an end in itself or for its own sake—if that means the advancement of the theory of education as taught in a training college for teachers—or even if it means the advancement of mind training. "Education" means, I think, simply the educating of people either in general subjects or in particular subjects. But the "advancement" of education connotes public, as distinct from private, benefit. Likewise, the "advancement of religion" connotes the promotion of religion by spiritual teaching or by pastoral or missionary work among others outside one's own circle. When a man says his prayers in the privacy of his bedroom, he may truly be said to be concerned with religion but not with the "advancement of religion."

The words "social welfare" themselves also connote, to my mind, the concept of public benefit. These words comprehend many objects which are beneficial to the community but are not charitable according to the somewhat limited interpretation given in the charity cases. A person is commonly said to be engaged in "social welfare" when he is engaged in doing good for others who are in need—in the sense that he does it, not for personal or private reasons—not because they are relatives or friends of his—but because they are members of the community or of a portion of it who need help. The need may not be due to poverty. It may be due to the conditions of life of the persons concerned. They are usually people who are under a disadvantage compared to others more favourably placed—boys who need a youth club instead of running on the streets—people of small means who are given holidays in a home which they could not otherwise afford—working men who need a club where they can spend their leisure—and so forth. If a person is engaged in improving the conditions of life of others who are so placed as to be in need, he is engaged in "social welfare." But people who are engaged in improving their own conditions of life are not engaged in social welfare. If an organisation is formed by public-spirited folk with the object of providing a boys' club—or a room for a women's institute—it is no doubt concerned with the advancement of social welfare: but if it is formed by a group of persons with the object of providing a social club for their own enjoyment or recreation, it is not. The difference between the two is that the main objects of the one are directed to the public benefit, whereas the others are not.

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[17] [1951] A.C. 297.

[18] [1955] A.C. 572.

The Court of Appeal seem to have derived some help by writing, as it were, into the section, after the words "social welfare," the phrase "as an end in itself or for its own sake." I find no special virtue in this phrase. It has for me no clear meaning. But if and in so far as it brings in the concept of public benefit, it brings into play the very distinction which is, I think, implied throughout the section.

It is this distinction which gives the clue to the deciding of the present case. I agree with Mr. Pennycuick that the main objects of this society are directed to social security—in the sense that the purpose is to enable people of small means to secure themselves against the risks which life holds for them—nevertheless I cannot see in its objects any element of public benefit. The purpose is that each member should provide for his own security—by means of his contributions and deposits—just as other people do by insurance. No member is concerned with doing good for others. Each one is concerned with doing good for himself and his family. And the society exists so as to enable each member to do just that very thing. I entirely agree with all the judges in the courts below in holding that this is not charitable or otherwise concerned with the advancement of social welfare.

I would therefore dismiss this appeal.

Lord Birkett. My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack. In my opinion, the special facts are decisive of the two main points raised in this appeal, and show that the appellant society's organisation is not

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established or conducted for profit, and that its main objects do not fall within the proper construction of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Appeal dismissed.

Solicitors: *Woolley, Tyler & Bury; Wrentmore & Son.*

F. C.

[HOUSE OF LORDS.]

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June 9, 10, 11, 12, 16, 17, 18, 19, 23, 24;
July 24.

SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY LTD. . . . . . APPELLANT;

AND

MEYER AND ANOTHER . . . . . RESPONDENTS.

Company—Oppression—Subsidiary company—Minority of independent shareholders—Majority of nominees—Controlling powers used to destroy subsidiary company—Remedy alternative to winding up—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 210.

By section 210 of the Companies Act, 1948: "(1) Any member "of a company who complains that the affairs of the company are "being conducted in a manner oppressive to some part of the "members (including himself) . . . may make application to the "court by petition for an order under this section. (2) If on any "such petition the court is of opinion—(*a*) that the company's "affairs are being conducted as aforesaid; and (*b*) that to wind up "the company would unfairly prejudice that part of the members, "but otherwise the facts would justify the making of a winding-up "order on the ground that it was just and equitable that the "company should be wound up, the court may, with a view to "bringing to an end the matters complained of, make such order "as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any "members of the company by other members of the company, "or by the company, and, in the case of a purchase by the

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM and LORD DENNING.

"company, for the reduction accordingly of the company's capital, "or otherwise."

In 1946 a co-operative wholesale society formed a subsidiary company to enable it to participate in the manufacture and sale of rayon materials and get licences to manufacture rayon cloth, the production of which was then controlled and remained controlled until 1952. The two respondents were appointed joint managing directors of the company, which, so long as cotton control lasted, was dependent on their skill, knowledge and experience and on their connections with the trade, and, because of these, licences were granted. The company's capital consisted of 25,000 shares of £1 each, 7,900 of which were issued. The respondents acquired 3,450 and 450 respectively, and the society acquired 4,000, appointing as directors three nominees who were also members of its own board. The company traded successfully for several years and earned substantial profits. In 1951 the society sought to purchase from the respondents their shares at less than their true value but the suggestion was rejected. The society dropped the attempt but adopted a policy of transferring the company's business to a new department within its own organisation, thereby forcing down the value of the company's shares. The nominee directors, though aware of this policy, did not inform the respondents but promoted the society's plans. In consequence, the company's business came virtually to a standstill and the value of its shares was greatly reduced. In 1953 the respondents presented a petition under section 210 for an order on the society to purchase the whole of their shares at a price based on their previous value or such other price as the court might think fit. It was common ground that at the date of the petition it was just and equitable that the company should be wound up:—

Held, that the society had acted towards the minority shareholders of the company in an oppressive manner, and that this conduct through the nominee directors of the company, who were also directors of the society, amounted to conduct of the affairs of the company, since the transactions of the two could not be separated. The inaction of the nominee directors amounted to a breach of their duties.

Per Viscount Simonds. When a subsidiary company is formed with an independent minority of shareholders, the parent company is under an obligation so to conduct its own affairs as to deal fairly with its subsidiary.

Held, further, that the respondents were entitled to the relief sought, since the purchase of the shares by the society would bring to an end the matters complained of, namely, the oppression. The making of a winding-up order would unfairly prejudice the minority shareholders.

Decision of the First Division of the Court of Session, sub nom. *Meyer* v. *Scottish Textile and Manufacturing Co. Ltd.*, 1957 S.C. 110; 1957 S.L.T. 250 affirmed.

APPEAL from the First Division of the Court of Session.

This appeal from a unanimous decision of the First Division of the Court of Session (Lord President Clyde, Lord Carmont, Lord Russell and Lord Sorn) concerned the application and scope of section 210 of the Companies Act, 1948, which dealt with " alternative remedy to winding up in cases of oppression." The interlocutor appealed from, dated March 20, 1957, was pronounced in a petition presented by Dr. George Meyer and Ronald Joseph Lucas, who were the respondents in the present appeal, under section 210, praying for an order on the appellants, Scottish Co-operative Wholesale Society Ltd., for the purchase of the respondents' shares in Scottish Textiles & Manufacturing Co. Ltd. By that interlocutor the appellants were ordained to purchase the whole of the respondents' shareholdings in the company at the price of £3 15s. a share. The total purchase price payable thereby was £14,625. The interlocutor was based on a certain construction of section 210 and on findings that the respondents had satisfied the provisions of the section by proving that the appellants' nominee directors on the board of the company were conducting the affairs of the company in a manner oppressive of the respondents, and that the respondents were accordingly entitled to the order sought. The appellants submitted that the interlocutor was unfounded both in fact and in law.

The facts are stated in their Lordships' opinions.

I. Robertson Q.C. (of the Scottish Bar), *Benjamin Bathurst Q.C.* (of the English Bar) and *A. Johnston Q.C.* (of the Scottish Bar) for the appellant society. This is the first case in which an order has been made under section 210 of the Companies Act, 1948. The following are the propositions on behalf of the appellant society: (1) On the facts the appellants did not pursue such a policy as was held by the court below of systematically diverting business from the company with the deliberate intention of injuring it. There is no evidence to justify such a finding and no evidence from which it can be inferred.

(2) Even taking the court's findings in fact as justified on the evidence, section 210 does not apply, because the actings complained of are actings in the affairs of another body, the appellants' own affairs.

(3) The remedy given by the court is not a remedy justified under section 210, because that section gives an alternative remedy to winding up under the " just and equitable " provisions of section 225. It is only when the company is to be kept going

and is fit to be kept going that the remedy here given is applicable. The remedy here given is the equivalent of an award of damages for past misconduct, which is not the remedy envisaged by section 210.

(4) In any event the valuation put on the shares was unjustified by the evidence.

If the appellants are right on the first point, the question of fact, that is the end of the case. Chronologically there are five chapters in the story of the company: (a) the period of success, 1947–51; (b) the period when the realignment of the shares was the main question, August, 1951, to February, 1952; (c) the period of decline, September, 1951, to January, 1953; (d) the period when the parties were at arms' length, through the threat of litigation; (e) the period after the presentation of the petition on July 14, 1953. It is not disputed that everything went well until 1951.

On the findings of fact it is submitted for the appellants: Till August, 1951, the company's position was precarious because it had no factory and no permanent contract with Falkland Mill for the obtaining of material. The proposals and negotiations for the realignment of shares at the end of 1951 were not pursued and had no bearing on the company's prosperity. In these negotiations it was not the appellants' policy to acquire all the respondents' shares, and the appellants accepted the principle of realignment on a valuation basis. From the end of 1951 the appellants had no scheme deliberately to deprive the company of material from Falkland Mill, so as to run down its business and depreciate the value of its shares. After the summer of 1951 the company got into trading difficulties for reasons unconnected with any policy of the appellants. The abolition of rayon control in June, 1952, had no effect on the company's progress. After August, 1951, the company gave no orders to Falkland Mill, which by September, 1952, had no looms working for the company, instead of 52 a year before. After this Meyer, on behalf of the company, did not give orders to Falkland Mill but got his cloth elsewhere. By the end of 1952 Falkland Mill was in desperate straits for work and the company's business was almost at a standstill. At this time Falkland Mill even offered to sell material to the company at a loss, but this was not accepted. The price offered was genuinely lower than the cost price. Falkland Mill was a small mixed mill of low efficiency which could not produce rayon cloth at a price competitive with the large mass-producing mills. By the end of 1952 relations in the company's board were strained because of matters unconnected with

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Falkland Mill. By January, 1953, the respondents had decided that they could not carry on and were determined to litigate if the appellants would not take over their shares at their own price. The appellants at this time considered that the best thing for the company would be that it should be wound up in view of its trading position and the losses it was incurring. The appellants had no desire or intention to continue the company if the respondents gave up, as the reason for its existence would then be gone. The merchant converting department was set up in June, 1951, and began to do business with Falkland Mill in December, 1952, as a consequence of the mill's idleness. The initiative in this association came from the mill's manager, Schofield. Thereafter the department did comparatively little work in rayon and did not compete for business with the company. The change-over to commission weaving was a consequence of disputes between the company and Falkland Mill and was a reasonable step for the appellants to take. Falkland Mill was under control of an independent manager, whose duty was to do his job efficiently in the appellants' interests. He at no time took orders from anyone as to how he should do his business and in particular as to his prices. These were genuine prices. The dismissal of the managing directors was necessary in the interests of the company's shareholders in view of its financial position. The nominee directors on the company's board never interfered with the respondents' conduct of the company's business and only twice was there a divided vote. The nominee directors never interfered with the working of the appellants' mill and had no right to do so. The board of the company after the change-over to commission weaving did what they could to get a lower price from Falkland Mill, without success.

Elder v. *Elder and Watson* [1] suggests the correct approach to section 210, and Lord President Cooper names the necessities for its application. (a) There must be oppressive conduct towards some part of the members, including the petitioner. (b) Winding up would unfairly prejudice that part of the members. (c) Otherwise the facts would justify winding up under the "just and "equitable" clause. The oppressive conduct must be in the affairs of the company and it must oppress the shareholder qua shareholder. The remedy contemplated under section 210 must bring the oppression to an end and the company must be fit to proceed as a going concern once the oppression is removed. That decision was referred to at an earlier stage of the present case by Lord President Cooper.[2]

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[1] 1952 S.C. 49, 54–55.

A proper case for the application of section 210 would be one of oppression when a company was prosperous and no one would have an interest in winding it up; the remedy might then be an order for the purchase of the shares of the majority by the minority, if the minority asked for it.

Section 210 provides an alternative to winding up. The legislature contemplated a continuing business with a continuing life ahead of it, whereas here the company's business was virtually at an end when the petition was lodged and there was no point in keeping it alive. Here an order under section 210 was not justified. It is not for the appellants to suggest what would have been the right remedy. The only relief under the section must aim at "bringing to an end the matters complained of," and this order for the purchase of the shares does not satisfy that requirement. Further, the value put on the shares was excessive at the time of the order. In the fixing of this value the court did not properly exercise its discretion. The order for the purchase of these shares amounts to an award of damages for past misconduct, a matter not within section 210.

The main point is that there must be oppressive conduct to bring the case within section 210, and here no oppressive conduct in the affairs of the company was proved by the respondents, on whom the onus lies. The section contemplates a lack of probity, but that is not established. When the nominee directors of the company were sitting in the board room of the appellant society they were bound not to take any action contrary to the appellant society's interests. What the appellant society did at their own board meetings could not be oppressive of the company in the affairs of the company. On the evidence here, looking at the actions of the nominee directors in the conduct of the company's business, there was no oppression by them in 1953. At most they were inactive, doing nothing to protect the company, but what could they have done? If they had protested at the appellants' actions, what good would that have done? The respondents' complaints all relate to the actions of the society and do not touch the real issue, which is concerned with the conduct of the company's affairs. The company's position was precarious from the beginning because it had no factory and there was no long-term agreement as to the looms. It should have ensured its supply of rayon cloth from the mill by a contract.

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[2] 1954 S.C. 381, 387.

Benjamin Bathurst Q.C. following. There are only two questions: (1) The main question is: Have the affairs of the company been conducted in a way oppressive of the respondents as shareholders? (2) If so, was the court entitled to adopt a remedy which (a) did not ensure the continuance of the company's business, and (b) amounted in effect to a judgment for damages, whereas the remedy contemplated by section 210 in general assumes continuance of the company's business?

The main, if not the only, ground on which the First Division held that section 210 applied was that (as found by the court, but denied by the appellants) from 1952 onwards the appellants used their own mill to manufacture cloth for sale by themselves rather than to the company. On this point, contrast the views of Lord President Clyde and Lord Carmont.[3] On the facts as found by the court,[4] neither Mr. Taylor, who was chairman of the appellant society at the material time, nor the nominee directors could control the society.

To bring section 210 into play a petitioner must satisfy the court of the three matters stated by Lord Cooper in *Elder* v. *Elder and Watson.*[5] Here the third is admitted (that it would be just and equitable to wind up the company). The second (that winding up would unfairly prejudice the members complaining) largely depends on the first.

As to whether the company's affairs had been conducted in a manner oppressive to some of the members, the conduct must be in the company's own affairs and not in those of some other body: see *per* Lord President Cooper and Lord Russell.[6] The fact found that the appellants decided to use their own mill to supply their own commercial requirements in preference to those of the company has no connection with the fact that the appellants happened to hold a majority of the company's shares. The policy would in any event have been detrimental to the company, and the fewer shares the appellants held, the greater would have been the advantage to them. No case of oppression under section 210 can be made on the appellants' use of their own mill. That was an action in the course of their own trading business. If the company's business depended on a continuance of a certain supply from the mill, it would have been a matter of ordinary commercial prudence to enter into a contract with the appellants for that supply, but this was never attempted: see *per* Lord President Clyde.[7] This lies at the root of the whole matter. The respondents are now trying to invoke section 210 to provide a remedy for a failure to take the normal business course of obtaining a contract.

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[3] 1957 S.C. 110, 122, 134.

[4] Ibid. 122, 134, 148.

[5] 1952 S.C. 49, 55.

[6] 1954 S.C. 381, 387, 394.

The higher prices charged by the appellants to the company did not amount to oppression. The respondents were never prevented from buying in the market. The fact was that supplies were unobtainable and so the expression "market prices" is meaningless. It is a fallacy to talk of the mill selling its products to the appellant society; it was part and parcel of the appellant society who could not sell to themselves. Though, as a matter of internal book-keeping, the mill may have invoiced its products to the merchant converting department, there was never a sale and purchase in the true sense. Lord Carmont[8] considered that this matter afforded no ground for complaint, and he was right.

As to the appellants' attitude on their proposal to buy the respondents' shares in the company, they were not bound to buy at the price fixed by the auditors: see *per* Lord President Clyde and Lord Carmont.[9] These negotiations should be ignored.

The inaction of the nominee directors was wrongly treated as oppression in the court below. They never interfered with the company's management in the day-to-day control of it, which was in the hands of the respondents as managing directors. There was nothing to prevent the respondents from getting supplies elsewhere. Further, the nominee directors had no control over the appellant society. They were powerless to alter the course of events and their resignation could not have affected the situation. The position would have been the same if no representatives of the appellant society had ever voted at a meeting of the company or its board.

Further, Schofield's actions as manager of the mill cannot be held to be oppression by a majority of the company's shareholders, since the actions of a mill manager independent of the company cannot be "conduct of the company's affairs" within section 210.

Lord President Cooper's statement[10] as to the position of a subsidiary company is too wide. The parent company's duty must be to conduct its own business in the best interests of its own shareholders. The minority shareholders in the subsidiary

[7] 1957 S.C. 110, 122.

[8] Ibid. 134–135.

[9] Ibid. 121, 131.

[10] 1954 S.C. 381, 391.

cannot expect to control the business of the parent company, which must be left in the hands of the directors and shareholders of the parent company. If as a matter of business the directors of the parent company consider that the interests of its shareholders are best secured by itself selling the products it manufactures, their duty (in the absence of any contractual duty to the subsidiary) must be to do so. The Lord President's view would involve the proposition that when a company holds just over 50 per cent. of another company's shares, its trading activities would be restricted owing to its "obligation" to its subsidiary, whereas if it owned just under 50 per cent. of the shares, no such obligation would exist. But in truth in the nature of things the minority shareholders in fact put themselves in the hands of the majority. That is the commercial risk they take.

As to the dismissal of the respondents, this took place after the presentation of their petition on July 13, 1953, and was done on counsel's advice. Events subsequent to proceedings should not be taken into account. Section 210 was not intended to meet the case of a director losing his office: see *Elder* v. *Elder and Watson*.[11] Liquidation was the only practical and sensible course at this date to preserve such assets as the company possessed. As a corollary, it was necessary to terminate the employment of the managing directors.

As to the remedy, section 210 provides an alternative to winding up. Section 210 (2) (*b*) clearly contemplates that the company will continue to operate. The court might make an order regulating the conduct of the company's affairs in future, possibly by altering the memorandum or the voting powers or by granting an injunction. The proper remedy here would be either to order the majority to sell their shares to the minority or to make an order "regulating the conduct of the company's "affairs in future" which would effectively prevent the majority oppressing the minority. The order appealed against would probably lead to a winding up because the appellants would have no reason to keep alive a wholly owned subsidiary. It amounted to "the solvent of a monetary award" which was not the remedy contemplated by section 210.

The relevant authorities are *Bell* v. *Lever Brothers Ltd.*[12]; *Irwin & Johnson Ltd.* v. *Oelofse Fisheries Ltd.*[13]; *In re Hannetta*

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[11] 1952 S.C. 49, 57, 58, 60, 61.

[12] [1932] A.C. 161; 48 T.L.R. 133.

[13] (1954) (1) S.A. 231.

Ltd.[14] and Buckley on the Companies Acts, 13th ed., p. 868 (as to improper use of powers).

R. Johnston Q.C. and *F. O'Brien* (both of the Scottish Bar) for the respondents. The decision of the Inner House was unanimous with no expressions of doubt or indecision. *Thomas* (*or Watt*) v. *Thomas*[15] indicates that this House will be slow to reverse conclusions so arrived at.

The view of the facts relied on by the respondents is as follows: The appellants were forced to create the company in order to enter the rayon trade and took advantage of the respondents' skill, knowledge and experience in that trade. The appellants had to maintain the company in existence up to the end of cotton control to stay in the rayon trade. From November, 1951, when realignment of shareholdings was in issue, the appellants, as majority shareholders, were determined to secure realignment at par and refused to consider realignment on a fair valuation basis. The reason for the company's decline was the general recession, and efforts to "bridge" the depression were unsuccessful. After the end of cotton control the appellants decided to divert the potential rayon production at the mill from the company in order to benefit one of their own departments, in the knowledge, shared by the nominee directors, that this would prejudice the company's trade and progressively depress the value of its shares. The recession in the rayon trade ended in September/October, 1952, after which time weavers were very busy and the conditions of trade, which prevailed before the recession, returned. At this time the looms at the mill were available for the resumption of production, having been idle because of the recession. The company had stocks in hand for converting to meet the then increased demand. Before the company required new stocks of cloth the appellants' drapery committee initiated the beginning of business between the mill and the merchant converting department and it was at once apparent that there was a prospect of increasingly profitable business being done between these two. This beginning was known to the nominee directors of the company, who were at the time members of the drapery committee. When the company applied to the mill for resumption of production of rayon and, in particular, standard quality 1009, Schofield was reluctant to do business. He quoted a price to the company which he knew was unacceptable because it was too high, being above the merchants' price of 1s. 6½d., which included wholesalers' profit. Meyer did not understand the quotation; he did not know of the negotiations between the mill and the merchant converting department and no one told him. In good faith he thought the mill's prices were the result of either faulty costing or inefficient manufacture or both and suggested in good faith ways and means of improving it. All his requests and suggestions were ignored. Because of market conditions the company could not get elsewhere supplies of cloth of the quality required in sufficient quantity and in time to take advantage of the returned boom. Consequently its trade did not recover. The appellants and the nominee directors were aware of this position and were aware that the result was to lower the value of the company's shares. Although deliveries of rayon from the mill to the merchant converting department were small at the beginning, there were prospects of increasing business between them. So far as the evidence goes, business increased on a substantial scale up to the end of January, 1955. Alternatively, if business between the merchant converting department and the mill began soon after the company asked for a quotation, the appellants and the nominee directors knew that the mill had been previously allocated for production for the company and they also knew that the company had applied for supply and had been quoted a price which the company considered excessive.

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[14] (1953) Nov. 2 (unreported); see 216 L.T.J. 639.

[15] [1947] A.C. 484; 1947 S.C.(H.L.) 45; 63 T.L.R. 314; [1947] 1 All E.R. 582.

The evidence clearly discloses a policy by the appellants to destroy the company.

In construing section 210 one must have regard to what the law was previously, to the mischief at which it was aimed and to the remedy provided. The terms of section 210 are very wide and there is no warrant for limiting by implication the scope of the circumstances to which it in terms applies. The meaning of section 210 cannot be affected by the nature of the remedy sought. When oppression has been established, together with the other facts required by the Act, there is no limit to the nature of the order which the court may pronounce; it may have an element of an award of damages. Section 210 is not designed to redress past wrongs, but the court's order may in effect be an award of damages for a continuing wrong.

Each nominee director was aware of and responsible for the policy of the appellants as a whole, and through them the appellants "conducted" the company's affairs "in a manner "oppressive" of the respondents. The nominee directors cannot

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shelter behind a wall of ignorance of the appellants' policy, especially as they were appointed to look after the appellants' interests.

The appellants say that section 210 does not apply because the actings complained of were actings in the affairs, not of the company but of another body, the appellant society. But when a subsidiary company is formed with an independent minority of shareholders, the parent company must conduct its own affairs so as to deal fairly with its subsidiary, and if their affairs are so closely interrelated that it is impossible to say that the affairs of the one are not the affairs of the other, then anything the parent company does is conduct in the affairs of the subsidiary company.

In any event, in this case the evidence discloses that the appellants, as majority shareholders, conducted the company's affairs oppressively in participating in the campaign to destroy its business. Conduct includes both active and passive conduct. When there is a duty to act, failure to act is as much conduct as any action. So any conduct, whether active or passive, is within the section. One would be conducting the affairs of a boat if one knew that it was heading for the rocks and neither interfered nor informed the crew. It is a fallacy to suggest that oppression can only take an active form. Inaction can be just as much conduct as action.

The nominee directors, knowing that the appellants' policy was to destroy the company, should have disclosed that policy to the respondents or resigned. Any director who acts for the destruction of his own company is not acting in its interests.

Oppression is not a commercial risk, although in the past a minority had to run it; that is the very thing which section 210 was designed to deal with.

It is a question of fact what are a company's affairs. Section 210 can cover the whole of its activities. In any view, its trading activities are covered. On the facts of this particular case, the obtaining of supplies of rayon cloth from the mill was a vital affair of this company, and when the appellants interfered with those supplies they were interfering in its affairs.

As to the contention that the appellants were only acting in their own affairs and not in those of the company, see what was said in the court below.[16]

The directors of a company are in a fiduciary position and must show the utmost good faith in dealing with it. Where a conflict of interest arises between their duty as directors of one company and their duty as directors of another company or their interests as individuals, they must act with good faith. The least the nominee directors could have done was to tell the respondents of the situation.

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[16] 1954 S.C. 381, 390–391; 1957 S.C. 110, 144, 154.

Oppression does not cease to be oppression merely because it is done on the advice of counsel. One would wish to know what was the case which was put before counsel. Also counsel's opinion may have been given on a wrong view of section 210.

As to the remedy, there is no express indication that it is essential under section 210 that the company must be capable of going on and that this limits its application, but, in any event, this company was capable of going on if the oppression was removed. Any order which the court judges will bring the oppression to an end is within the competence of section 210. If the appellants were right, there would be a remedy for slight oppression, but not for grave destructive oppression: *per* Lord President Cooper.[17]

Even though the order now pronounced may have an element of damages, that does not make it improper. On the facts this was not a company which inevitably had to be wound up. It was fit to be kept alive either when the petition was first presented or when the complaints of diversion of the mill's production were first made. The company could have issued fresh capital and built its own factory. It had large resources and, on the evidence, it is not proper to suppose that it was moribund.

I. Robertson Q.C. in reply. At the material time the company was no longer able to trade, not because of any deliberate policy of the appellants, but because of the conditions prevailing. But, even assuming oppression in fact, the respondents cannot recover at law. In view of the terms of section 210, what was done within the appellant society could not be oppression within the section. There must be a difference between the conduct of the affairs of the company and the conduct of the affairs of the society. The nominee directors were not bound to disclose to the respondents information received in the appellants' board room. Their failure to resign was not oppression; it cannot be said to have affected the consequences of the alleged oppression. They were not in breach of their duty.

Their Lordships took time for consideration.

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[17] 1954 S.C. 381, 391–392.

July 24. VISCOUNT SIMONDS. My Lords, in this appeal from an interlocutor of the First Division of the Court of Session I am in such full agreement with their Lordships both in their findings of fact and in their conclusions of law that I do not think it necessary to trouble the House at such length as I otherwise might. But, inasmuch as your Lordships have for the first time to consider a new and important section of the Companies Act, 1948, it is right that I should state my views upon it.

On May 7, 1946, there was incorporated as a private limited company the Scottish Textile and Manufacturing Co. Ltd., which I will call "the company." It had an authorised share capital of £25,000 divided into 25,000 shares of £1 each. Its substantial object was the manufacture and merchanting of rayon fabrics. The respondents, formerly of German but now of British nationality, who had left Germany when the Nazis obtained power in that country, had a large experience and extensive connections in the continent of Europe in the rayon trade, and one of them, Dr. Meyer, had already in 1945 been appointed textile adviser to the appellant society. Into this trade the society wished to enter and, though they would have preferred to carry it on as a branch of their own business, this was for more than one reason not practicable. The respondents were unwilling to act merely as employees of the society and, since at that time licences had to be obtained for the manufacture of rayon, and were granted only to persons who could satisfy the cotton control authorities that they commanded the necessary skill and experience, it was mutually advantageous to the society and the respondents that a subsidiary company should be formed in which they should both be interested. The company was accordingly formed and 7,900 shares were issued, 4,000 to the society, 3,450 to Meyer, 450 to Lucas. Thus the society had such control as a majority shareholding could give. Moreover, of the five directors of the company three were at all material times nominees of the society, the other two being the respondents, who were the managing directors. Nor was there lacking control by the society of a practical sort. For from the outset it was contemplated that, at any rate until a factory could be built or acquired for it, the company should be substantially dependent for its supplies upon the society's mill at Falkland which in 1946 was partially idle. Accordingly, under arrangements with cotton control, the production of a number of looms at Falkland was allocated to the company and the looms were licensed for rayon production. Dr. Meyer made arrangements for the supply of rayon yarn to be used in the manufacture of the finished cloth, the yarn being purchased by the society and invoiced to them at Falkland Mill. There it was woven and the woven cloth sold to the company ready for dyeing and finishing. This was the plan, and from the beginning it flourished greatly.

But, my Lords, it was a plan which demanded the utmost good faith on both sides, and, as your Lordships will see, it was the lack of it on the part of the society which led to this discreditable tale.

I must hark back for a moment to the year 1947. It seems that in March of that year an agreement between the parties was made for what was curiously called a realignment of their shareholding, so that, instead of approximately equal holdings, the society should hold 70 per cent. and the respondents 30 per cent. of the issued capital. That was in March 1947, but nothing was done to carry the agreement into effect until the year 1951. In November of that year, the company being then apparently very prosperous, the nominee directors, as I will call them, under the instructions of the board of the society raised the question: numerous proposals were put forward, some of which involved the purchase by the society of some of the respondents' shares. It is unnecessary to go into the details of this episode, for in the end nothing was done. The significance of it lay in the fact that the society's representatives adopted the view that they were entitled to acquire at par any shares they might get under the so-called realignment and, upon a refusal of this unjust demand, threatened that the society would liquidate the company if it was not met. This and other threats led to legal advice being sought. The solicitor to the society and the company advised that the shares should be valued and bought at a valuation: they were valued by the company's auditors at no less than £6 0s. 11d. a share and thereafter the society proceeded no further in the matter. It is impossible after reading the voluminous evidence in this case not to see that the society, thus foiled in their attempt to obtain a grossly unfair advantage of the respondents, determined to seize any opportunity of procuring for themselves the benefit of the trade which had been largely built up by their efforts.

It is at this stage convenient to refer to the section of the Act under which the respondents petitioned the court for relief and obtained the order, against which this appeal is brought, that the society should buy their shares in the company at £3 15s. 0d. per share. It is, so far as relevant, as follows:

[His Lordship read section 210 (1) and (2) and continued:] It is common ground that at the date of presentation of the petition on July 13, 1953, it was just and equitable that the company should be wound up. It could hardly be denied that to wind up the company would unfairly prejudice the respondents. The only question is whether its affairs were being conducted in a manner oppressive to the respondents and, if so, whether the court ordained the appropriate remedy.

My Lords, as I have already said, I do not propose to rehearse the facts at length. The four learned judges of the First Division, including Lord Carmont who was deputed to take the proof, were unanimously of opinion that the society had conducted the affairs of the company in a manner oppressive to the respondents. Each of them gave a judgment which, I may perhaps be permitted to say, was a careful and exhaustive appraisal of the evidence, and, even if I did not myself come, as I do come, upon an independent reading of it to the same conclusion, I should be reluctant to disturb their findings, particularly as Lord Carmont had the peculiar advantage of seeing the witnesses. It cannot be ignored that, wherever there was any dispute of fact, the testimony of the respondents was preferred to that of the witnesses of the society. Having myself only read the written word, I must say that I was by no means favourably impressed by the evidence of more than one of the latter witnesses.

It is, however, necessary, if section 210 is to be successfully invoked, to show, not only that there has been oppression of the minority shareholders of a company but also that it has been the affairs of the company which have been conducted in an oppressive manner, and it was to this point that a large part of the appellants' argument was directed. I must therefore state in broad outline the course of events which led to the presentation of the petition.

The last event that I mentioned was the failure of the society to acquire at par shares that were worth a far greater sum. This was at a time of the company's great prosperity which, subject to the ups and downs of the textile trade, might be expected to continue. It was, however, followed by a recession in the rayon trade, of which the dates of beginning and ending were a matter of dispute. Such dates cannot be precisely determined and are of no consequence. It is, however, to be noted that it was in the course of it that rayon control came to an end, so that neither the society nor the company any longer depended on the personality of the respondents to get supplies of yarn. It was also in the course of it that the respondent Meyer was anxious to visit Germany with a view to increasing the company's trade in that country but was prevented by his co-directors from doing so. This was undoubtedly the cause of much ill-feeling and was itself a matter of complaint in the original petition, but, as the averment in regard to it was struck out, I say no more about it. During the same period other incidents occurred which aggravated the hostile relations between Meyer and Schofield, the manager of the society's Falkland Mill.

An important consequence of the removal of cotton control was this. In or about June, 1951, a new department of the society had been formed called the merchant converting department. It was under the control of a Mr. Wand, the manager of the drapery department, and its function was to convert loom state cloth by dyeing, printing and finishing into material for manufacture into garments. It therefore became possible upon the removal of cotton control and upon a revival of the rayon trade for the society to divert to their own converting department the product of their Falkland Mill. It was the fact, as they were well aware, that the company which had throughout been practically tied to them for the greater part of its supplies, would have great difficulty upon a revival of trade in getting them elsewhere. Deliberately they supplied the necessary material to the converting department but, in spite of Meyer's protests, declined to supply the company except at higher and non-competitive prices. An attempt to justify this discrimination was rightly regarded by their Lordships of the First Division as unsatisfactory. I have no doubt that at any rate by the end of 1952 it was the policy of the society by one means or another to destroy the company it had created, knowing that the minority shareholders alone would suffer in that process. But it is, in truth, unnecessary to seek to draw inferences from ambiguous facts. For in January, 1953, a Mr. Robert Taylor, a director of the society and then chairman of the company, had an interview with Meyer and Lucas. He cannot be absolved from a share in the lethal policy of the society but is entitled to what credit may be due for the attempt to make the death as merciful as possible. He told them frankly that the society was out to destroy the company, that they had no chance against such a powerful organisation, and that they should make their peace with the society by offering to sell their shares, and he offered to draft, and, two days later, drafted, a letter for them to send to the society. It is not surprising that Meyer wrote, though not in terms suggested by Taylor, offering on behalf of Lucas and himself to sell their shares at a negotiated price. This letter having been referred to a joint meeting of the society's finance sub-committee and the furnishing sub-committee, those sub-committees met and agreed that the company had served its purpose and should be liquidated, if possible. At about the same time the finance sub-committee interviewed the respondents, who intimated that in their opinion a fair price for the shares was 96s. per share and also that they were prepared after selling their shares to stay on in the service of the company. The same sub-committee recommended that Dr. Meyer should be informed that the society did not wish to accept the offer to sell " at the present " time." These recommendations were approved by the board of the society on February 9, 1953, and a letter was duly sent to Meyer informing him of the decision not to accept the offer to sell " at the present time." He was not told and did not learn, until in these proceedings the minute was produced, that the society had decided that " the company had served its purpose " and should be liquidated if possible.

At this time the three nominee directors of the company were aware (Taylor by his own confession) of the policy of the society. It is undeniable that persons so placed may find themselves in a difficulty. But in all the evidence I have not been able to find the least trace that they regarded themselves as owing any duty to the company of which they were directors. They were the nominees of the society and, if the society doomed the company to destruction, it was not for them to put out a saving hand. Rather, they were to join in that work, and, when a frank and prompt statement to their co-directors might have enabled them to retrieve its fortunes, they played their part by maintaining silence. That is how they conducted the affairs of the company, and it is impossible to suppose that that was not part of the deliberate policy of the society. As I have said, nominees of a parent company upon the board of a subsidiary company may be placed in a difficult and delicate position. It is, then, the more incumbent on the parent company to behave with scrupulous fairness to the minority shareholders and to avoid imposing upon their nominees the alternative of disregarding their instructions or betraying the interests of the minority. In the present case the society pursued a different course. It was ruthless and unscrupulous in design and it was effective in operation, and, as I have said, it was promoted by the action or inaction of the nominee directors. The company, which might have recovered its former prosperity, had "served its purpose." It could conveniently be liquidated. I have omitted much which reflects no credit on the society and its officers, for I do not want to repeat what has already been said, or to anticipate what will fall from some of your Lordships. I will only mention the final fact that on August 24, 1953 (that is, after the presentation of the petition under section 210) Meyer and Lucas were given three months' notice of termination of their appointments as managing directors, and Mr. Wand, the manager of the society's drapery department, was appointed manager of the company.

My Lords, upon the facts, as I have outlined them and as they appear in greater detail in the judgments of their Lordships of the First Division, it appears to me incontrovertible that the society have behaved to the minority shareholders of the company in a manner which can justly be described as "oppressive." They had the majority power and they exercised their authority in a manner "burdensome, harsh and wrongful"—I take the dictionary meaning of the word. But, it is said, let it be assumed that the society acted in an oppressive manner: yet they did not conduct the affairs of the company in an oppressive manner. My Lords, it may be that the acts of the society of which complaint is made could not be regarded as conduct of the affairs of the company if the society and the company were bodies wholly independent of each other, competitors in the rayon market, and using against each other such methods of trade warfare as custom permitted. But this is to pursue a false analogy. It is not possible to separate the transactions of the society from those of the company. Every step taken by the latter was determined by the policy of the former. I will give an example of this. I observed that, in the course of the argument before the House, it was suggested that the company had only itself to blame if, through its neglect to get a contract with the society, it failed in a crisis to obtain from the Falkland Mill the supply of cloth that it needed. The short answer is that it was the policy of the society that the affairs of the company should be so conducted and the minority shareholders were content that it should be so. They relied—how unwisely the event proved—upon the good faith of the society, and, in any case, they were impotent to impose their own views. It is just because the society could not only use the ordinary and legitimate weapons of commercial warfare but could also control from within the operations of the company that it is illegitimate to regard the conduct of the company's affairs as a matter for which they had no responsibility. After much consideration of this question, I do not think that my own views could be stated better than in the late Lord President Cooper's words on the first hearing of this case. "In my view," he said,[1] "the section warrants the court in looking at the business "realities of a situation and does not confine them to a narrow "legalistic view. The truth is that, whenever a subsidiary is "formed as in this case with an independent minority of share-"holders, the parent company must, if it is engaged in the same "class of business, accept as a result of having formed such a "subsidiary an obligation so to conduct what are in a sense its "own affairs as to deal fairly with its subsidiary." At the opposite pole to this standard may be put the conduct of a parent company which says: "Our subsidiary company has served its "purpose, which is our purpose. Therefore let it die," and, having thus pronounced sentence, is able to enforce it and does enforce it not only by attack from without but also by support from within. If this section is inept to cover such a case, it will be a dead letter indeed. I have expressed myself strongly in this case because, on the contrary, it appears to me to be a glaring example of precisely the evil which Parliament intended to remedy.

Some criticism was made of the relief given by the order of the court. It was said that only that relief could be given which had as its object and presumably its effect the "bringing to an "end of the matters complained of" and that an order upon the society to purchase the respondents' shares in the company did not satisfy that condition. This argument is without substance. The matter complained of was the oppression of the minority shareholders by the society. They will no longer be oppressed and will cease to complain if the society purchase their shares.

Finally, it was said that the court had not properly exercised its discretion in fixing a price of £3 15s. 0d. per share. I see no ground for interfering with this decision. Necessarily a price cannot be scientifically assessed, but I heard no argument, nor had any evidence called to my attention, which suggested that their Lordships had acted on any wrong principle or adopted a measure too generous to the respondents.

The appeal should accordingly, in my opinion, be dismissed with costs.

LORD MORTON OF HENRYTON. My Lords, I shall refer to the appellant society as "the society," and to Scottish Textile and Manufacturing Co. Ltd. as "the company."

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[1] 1954 S.C. 381, 391.

I would accept the finding of fact by the First Division of the Court of Session which the Lord President expressed as follows [2]: "Foiled in their attempt to secure the realignment of the share-"holdings by the purchase of shares from the petitioners at or "about par, the society as a matter of policy thereafter proceeded, "as the subsequent events demonstrated only too clearly, to "endeavour to force down the value of the company's shares, "and in the process in effect to transfer the goodwill of the "company's business to the society itself."

The conduct thus described was, no doubt, oppressive to the company and to the respondents, minority shareholders in the company. It is necessary, however, to consider what was the nature of the steps taken by the society in furtherance of the policy thus described, in order to see whether they bring the case within section 210 of the Companies Act, 1948. The respondents, as members of the company, can only succeed if they prove that "the affairs of the company"—and I emphasise the words "of "the company"—were "being conducted in a manner oppres-"sive to some part of the members," i.e., to themselves.

I cannot improve upon the learned Lord President's summary of the steps taken by the society and I gratefully adopt it. After referring to the fact that cotton control, and its attendant licensing system, came to an end in June, 1952, the learned Lord President continued [3]:

"The door was then open for the department" (that is, the society's own merchant converting department) "to utilise "Falkland Mill" (which belonged to the society) "for the manu-"facture of rayon and to merchant it themselves—thereby "by-passing the company altogether. The trade and the con-"nections built up by the company could then be transferred to "the society itself, and the goodwill of the company emptied "of almost any content. No contractual arrangement had been "made between the company and Falkland Mill whereby the "latter undertook to do the weaving for the former. All the "members of the company's board knew that the facilities at "Falkland Mill were essential to the company, and no breach of "any formal contract (as distinct from any question of fair "dealing) was therefore involved in Falkland Mill abandoning "the customer who had employed it for so many years and

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[2] 1957 S.C. 110, 121.

[3] Ibid. 122.

"substituting the merchant converting department of the society "as its customer. But this is what was in fact done.

"By the autumn of 1952 a temporary trade recession in rayon "had passed; manufacturers were getting busy, and the market "was short of goods. It would not have been easy for the "company in these conditions to secure its manufacturing require-"ments in some other quarters. Now that the barrier created "by the existence of cotton control was removed, this was the "moment selected for the gradual transfer of the society's "interest in the merchanting of rayon from the company to the "merchant converting department."

The Lord President then went on to state that the prices which Falkland Mill quoted for deliveries to the company, and refused to lower, were quite uneconomic for the company and were throughout consistently above market prices. He referred to efforts made by the respondent, Dr. Meyer, to induce Falkland Mill to do business with the company, and continued [4]:

"Nothing came of these approaches, as the mill's prices "remained far too high. Dr. Meyer reported the difficulties to "the board of the company, all the members of which must have "realised how serious an effect these high quotations were having "on the operations of the company. But none of the members "of the board appear to have given him any assistance or "explanation, nor taken any steps to try to remedy the situation "by raising his difficulties at any committee or board meeting of "the society.

"The reason is not far to seek. At the very time when Dr. "Meyer was finding the mill consistently quoting these high "prices to him, the society decided that the merchant converting "department should obtain deliveries of rayon goods from the "Falkland Mill. This was not a mere departmental matter "arranged between managers, but was raised to a policy level by "a direct approach to the merchant converting department by the "manager of Falkland Mill. This is clear on the evidence both "of Mr. Schofield and Mr. Wands. The board of the society "and the society's nominee directors on the board of the company "were, therefore, fully advised of the decision.

"Moreover, the arrangement made was that the mill would "supply woven rayon cloth to the merchant converting depart-"ment and that the mill would 'accept the prices which the "'department was prepared to pay, and see the manager of the

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[4] 1957 S.C. 110, 123.

"'department about it later if the prices were not economical "'ones.' To start with, experimental orders only were given "and accepted. But the manager of the department said in "evidence that he gave Falkland Mill in 1952 enough orders to "keep the looms going for six months. In 1953 and 1954 all the "rayon looms at Falkland were operating for the merchant converting department. This department was buying from the "mill at prices throughout substantially lower than those quoted "by the mill to the company. Moreover, on the costing figures "produced by the respondents, the prices at which the merchant converting department were buying were completely "uneconomic.

"It was contended that there was nothing wrong in the mill "changing over from one customer to another, particularly if "the mill could not arrange a mutually satisfactory price with "the company. This would no doubt be so if both customers "were treated alike, or if it could be maintained that the company was holding out for an unduly low price. But this was "not the situation. The policy adopted involved starving the "company of deliveries and diverting the production to the "merchant converting department at substantially lower prices "with the understanding that the department would see about "it later if the prices turned out too small. It involved a clear "violation of the elementary principles of fair dealing which "normal commercial standards require."

My Lords, it is, I think, manifest that the oppressive operations so clearly described were all operations in the conduct of the society's affairs, not in the conduct of the company's affairs. The society so conducted its affairs as to oppress the company by shutting it off from its previous source of supply. By so doing the society did, I think, oppress the minority shareholders in the company; but, as I have already pointed out, the respondents can only bring themselves within section 210 of the Act of 1948 if they prove that the affairs of *the company whereof they are members* are being conducted in a manner oppressive to themselves as minority shareholders. They cannot succeed, in my opinion, merely by proving that the affairs of another company are being so conducted, even if that other company holds the majority of the shares in the company whereof the petitioners are members, and nominates the majority of its directors. It may be unfortunate that this form of oppression is not covered by the section; but this is, to my mind, the inevitable result of the words "the affairs of the company are being "conducted." For this reason, my Lords, I should have held the appellant society entitled to succeed if the only evidence of oppression had been evidence that the society deliberately so conducted its own affairs as to cause hardship to the company and to force down the value of its shares, however regrettable such conduct may be, and whether or not it may be actionable.

I turn now to consider whether there is any other ground upon which the present case comes within section 210. Counsel for the respondents contend that certain directors of the company, nominated by the society and constituting a majority of the company's directors, or the society acting by these directors, "conducted" the affairs of the company "in a manner oppressive" to the respondents. As these directors of the company were also directors of the society, they must, no doubt, be treated as parties to the oppression by the society in the conduct of its own affairs; but I have had great difficulty in arriving at a conclusion upon the question just posed, which is directed only to the affairs of the company. The inaction of these directors at a critical time was pointed out by the Lord President in a passage which I have already quoted from his judgment, and their conduct throughout the relevant period is open to severe criticism. My difficulty is that the conduct of which complaint is made consists rather of sins of omission than of sins of commission, and the day to day affairs of the company appear to have been "conducted" by Dr. Meyer and Mr. Lucas without any active interference by the other directors, except, possibly, on two occasions, which the First Division excluded from proof on the ground of irrelevancy, and except that notice of dismissal, on the ground of saving expense, was given to the respondents after they had presented the present petition. I shall not detain your Lordships by referring in detail to the evidence. Suffice it to say that in the end I have reached the conclusion that there is evidence to justify the view that the affairs of the company were "conducted in a manner oppressive" to the respondents. I am not disposed to give a narrow meaning to these words, having regard to the manifest object of section 210. I am naturally assisted to my conclusion by the fact that the decision of the four learned judges of that Division (including Lord Carmont, who had the advantage of seeing and hearing the witnesses) was unanimous, and by the fact that your Lordships are all of the same opinion.

I agree that this appeal must be dismissed.

LORD KEITH OF AVONHOLM. My Lords, this appeal arises out of a petition presented by the respondents (whom it will be convenient to refer to as "the petitioners") against, inter alios, the appellants (whom I will call "the society") under section 210 of the Companies Act, 1948. Under the procedure of the Court of Session such a petition must be presented to the Inner House and, unless it is remitted to the Outer House, is dealt with and disposed of by the Inner House. Where in the Inner House inquiry into the facts through the mouths of witnesses is thought necessary, evidence is taken in the presence of one of the judges of the Division of the Inner House before whom the petition comes and the hearing on the evidence thereafter takes place before the full Division, including the judge who saw and heard the witnesses. This judge gives no opinion until, after the hearing, he takes part in the judgment of the court. This was the procedure followed in the present case.

This petition was presented as far back as July 14, 1953, and after a hearing on relevancy the court, on June 1, 1954, gave a judgment allowing parties a proof before answer of their respective averments, excluding certain averments of the petitioners from probation, and appointed the proof to proceed before Lord Carmont, one of their number. The proof, which commenced on March 25, 1955, was lengthy and voluminous and extended, with many interruptions, for a period of over a year, though the actual number of days occupied was only 12. After a hearing lasting 13 days, the First Division gave judgment on March 20, 1957, ordaining the society to purchase the shares of the petitioners in the Scottish Textile and Manufacturing Co. Ltd. (hereinafter called "the company") at a price of £3 15s. per share.

It is difficult to compress the salient features of the case even in broad outline. The petitioners, who were originally of German nationality and are now naturalised British subjects, came to this country in 1939. Through an advertisement Dr. Meyer (one of the petitioners) got into touch with the society in 1945 and got employment from them as textile adviser. He had considerable knowledge of rayon trade and production and conceived the idea that one of the society's weaving mills at Falkland could be profitably employed in the weaving of rayon goods, which would be for it a new line of manufacture. He had great experience of the processes involved and had formulae of his own. He also had trade connections abroad and he succeeded in establishing relations with the cotton control board who controlled the supply of yarn and manufacture of the cloth. Ultimately it was agreed between the society, Dr. Meyer and the other petitioner Mr. Lucas, who had been associated with Dr. Meyer in the textile business in Germany before the war, that a company should be formed on certain terms for the purpose of manufacturing and dealing in textile fabrics of all descriptions. The company called the Scottish Textile and Manufacturing Co. Ltd. was incorporated on May 7, 1946, with an authorised capital of £25,000 in one pound shares. Thereafter in March, 1947, a second agreement was entered into between the parties which gave effect largely to what had been agreed before the incorporation of the company. The terms of this agreement are important in the light of what follows. I recite the greater part of this agreement:

"FIRST. The share capital of said company is £25,000 " divided into 25.000 shares of £1 each and subject to the provi- " sions of clause 10 hereof the [society] shall subscribe and hold " in their own right up to 17,500 of said shares, [Dr. Meyer] " shall subscribe and hold in his own right up to 5,250 of said " shares and [Mr. Lucas] shall subscribe and hold in his own " right up to 2,250 of said shares the said shares to be allotted " and issued from time to time as the directors of the Scottish " Textile and Manufacturing Co. Ltd. may decide.

"SECOND. The [society] shall purchase as they do hereby " purchase from [Dr. Meyer] all his formulae for the manufac- " ture of textile fabrics for the price of £3,000 which formulae " [Dr. Meyer] has now delivered to the [society] and as to pay- " ment of said price [Dr. Meyer] hereby requests and authorises " the [society] to pay the same to the said Scottish Textile and " Manufacturing Co. Ltd. to be held for his account and applied " towards settlement of the amount due by [Dr. Meyer] to said " company for shares allotted to him.

"THIRD. The [society] in addition to being otherwise en- " titled to use said formulae shall place the same at the disposal " of said Scottish Textile and Manufacturing Co. Ltd. which " shall have full liberty and licence to use the same without " restriction.

"FOURTH. The [society] are entitled and shall continue " to be entitled to nominate three persons to act as directors of " the said Scottish Textile and Manufacturing Co. Ltd. along " with [Dr. Meyer] and [Mr. Lucas] who already have been " elected directors of the company and appointed managing " directors thereof.

. . . . .

"SEVENTH. [Dr. Meyer's and Mr. Lucas's] appointments "as joint managing directors shall subsist for a period of three "years as from May 7, 1946, notwithstanding the date hereof, "and on the expiry of said period unless terminated as herein- "after provided, or unless renewed for a further period, shall "thereafter continue from year to year. [Dr. Meyer's and Mr. "Lucas's] appointments as managing directors or one or other "of them may be terminated by the company on three months' "previous notice in writing being given to that effect, but said "notice shall not prejudice their status to act as ordinary "directors of the company if so elected.

"EIGHTH. [Dr. Meyer and Mr. Lucas] in the perform- "ance of their duties as joint managing directors shall promote "and safeguard the company's interests faithfully and with due "diligence and they shall devote their whole time to the manage- "ment and supervision of the company and in particular they "shall apply without reservation in any respect their specialised "knowledge and experience in the textile trade to the advantage "and benefit of the company. [Dr. Meyer and Mr. Lucas] "shall also use every endeavour to renew or to re-establish all "former trade connections held by them with customers and "agents both in Great Britain and abroad with the purpose of "enhancing and developing the company's interests to the best "extent.

"NINTH. [Dr. Meyer and Mr. Lucas] shall make full dis- "closure for the use benefit and advantage of the company of all "formulae, processes and inventions which they may discover "during the tenure of their appointments. They shall also place "at the disposal and use of the company all patent rights (but "excluding trade names previously held by them) of which they "are the present owners or of which they may come to be "possessed during the period of their respective appointments "and that all free of charge. Further [Dr. Meyer and Mr. "Lucas] or either of them bind and oblige themselves not "to transfer or make known to any other person or company "any formulae (including the formulae sold to the [society] by "[Dr. Meyer]) processes, patent rights or inventions held or to "be held by them or to become known to them respectively "without the written consent of the company. Neither shall "they grant licences to any other person or company to use "such formulae, processes, patent rights or inventions without "the written consent of the [society].

"TENTH. In the event of this agreement coming to an end "or in the event of [Dr. Meyer's and Mr. Lucas's] appointments "with said company being terminated from any cause whatever "[Dr. Meyer and Mr. Lucas] shall have the option to sell their "shares in said company to the [society] who shall be bound to "purchase said shares and that at a price to be fixed by the "auditors of the company, said auditors' decision as to price "being final and binding; . . ."

Of the authorised share capital of the company only 7,900 shares were actually issued, of which 4,000 were held by the society, 3,450 by Dr. Meyer, and 450 by Mr. Lucas, all fully paid. This was not according to the proportions contemplated by the agreement, which were in the ratio of 70 to 21 to 9, and although this disproportion was accepted and apparently desired by the society at the beginning, it carried with it later, as will be seen, the seeds of dissension between the society and the petitioners.

To commence operations it was necessary for the company to secure three things—sources of supply of rayon yarn, a licence from cotton control to obtain and weave the yarn, and a place at which to weave it. Dr. Meyer was the chief, if not the sole instrument, in obtaining the first two of these things and he was largely responsible for securing the third. It was contemplated apparently that the company might obtain a factory of its own. On December 29, 1945, before the company was incorporated, the society minuted approval of a recommendation by its furnishing sub-committee "that steps should be taken without delay to rent a suitable factory. When we are successful in obtaining "premises, sub-committee would consider transferring to them "[the company] several looms (say 24) from the linen works at "Falkland. Until such time as a factory becomes available, "production would be carried on at Falkland and elsewhere." At a meeting of the company's board on January 14, 1947, Dr. Meyer reported disappointment that the 24 looms promised at the outset had not been altogether made available and that not more than 10 looms were running on the company's behalf at Falkland. He stressed the fact that "sales total was entirely "dependent on the supply of cloth received from Falkland and "that the rapid progress of the company was only possible by "means of increased production." The board, which included the society's nominee directors, resolved that the report be accepted and the society be approached to ascertain a date when the company might expect the 24 looms to be in operation on its behalf. Dr. Meyer had in fact by this time obtained a licence from cotton control for these looms, and in March, 1948, he received a revised licence to operate 40 looms at Falkland Mill with effect from March 1, 1948. It is only necessary to add that rayon production at the mill increased from some 23,000 yards in 1946–47 to over 475,000 yards in 1949–50, showing to the mill, in money, an increase from £3,087 to £39,532. The relationship observed between the company and the mill was that Dr. Meyer procured the rayon yarn, which was invoiced to the mill and paid for by the society, and the company paid the mill for the cloth produced for it. The cloth was then dyed, dressed, or otherwise treated and sold by the company to its customers. The idea of setting up an independent factory by the company faded into the background and after a short initial period, when the mill was being equipped and its workers trained for rayon production, the mill, on the rayon side, became the company's chief supplier and the mill wove rayon exclusively for the company.

The rest of the story is an unfortunate one. The company prospered for some five years and more, made considerable profits, paid large dividends and accumulated substantial reserves. The rayon looms at Falkland Mill were, during the same period, fully employed. About September, 1951, however, trade began to slacken. To Dr. Meyer it appeared that a recession was approaching, not unconnected with rumours about changes in purchase tax. He wished to hold back supplies ordered from Falkland Mill until he saw how things were going to develop and what customers wanted. This did not please Mr. Schofield, the manager of the mill, who wished to keep his workers engaged on the looms. He had large quantities of yarn in stock obtained through the efforts of Dr. Meyer. I have little doubt that Dr. Meyer's policy was sound, looking to the close relations between the mill and the company. If there was no market for cloth, there was no point in the mill making cloth to be accumulated by the company with no orders in sight and with no money coming in to pay for it. The last bulk order for cloth given by the company to the mill in 1951 was on August 22, 1951, and a dispute arose about the mill continuing to weave to this order, which was not settled till April, 1952. There are indications in the evidence that even before this Mr. Schofield was not particularly well disposed to Dr. Meyer and I think that from this time onwards his attitude unjustifiably hardened against him.

Another event took place about this time which is crucial in this case. The society, stimulated presumably by the prosperity of the company and desiring to have a share interest in the company corresponding to what they were entitled to under the original agreement, decided to seek what was described as a proper alignment of the shareholding. The matter came before the society first on August 20, 1951, and their representatives on the company's board were thereafter asked to raise the matter with the company. At a board meeting of the company on November 5, 1951, proposals were continued for further consideration at a meeting to be held on November 22. In the meantime, on November 15 an informal meeting took place between Messrs. Nicholson, Patterson and Dow, the society's nominees on the company's board, and Dr. Meyer and Mr. Lucas, at which Mr. Douglas, the company's secretary, was also present. No minute was taken of this meeting and what transpired can be got only from the evidence given in this case. The judges of the First Division, including Lord Carmont, who saw and heard the witnesses, have accepted the account given by Dr. Meyer and Mr. Lucas, and I find it impossible to take a different view. At the meeting discussion took place on certain proposals for rearrangement of the share capital. The society's representatives insisted that they should acquire the shares at par. Dr. Meyer and Mr. Lucas objected. Discussion got heated and the petitioners say threats were made that if they did not agree the society would liquidate the company. When Dr. Meyer pointed out that this was impossible as the society did not have a three-quarter majority of shareholding, another threat was made that "we will increase "the capital to £25,000 and that will put you in a pickle." The shares of the company were at this date of considerable value. But Mr. Nicholson, one of the society's representatives, who was present at the meeting, agrees that the society was determined to realign the shares at par value.

Following this meeting Dr. Meyer put forward certain proposals in writing to the society, one of which was that 5,100 new shares should be allotted to the society at a value to be ascertained by the auditors of the company. The society resolved to ascertain the decision of the auditors before coming to a decision. The auditors fixed a value of £6 0s. 11d., and on February 18, 1952, the society's board resolved that this be noted and communicated this decision to the company. No further action was ever taken in the matter of realignment of shares by the society. From this date till the end of the tale it is, I think, clear that there existed in the company an atmosphere of hostility on the part of the society's nominees on the board to the petitioners, except in the case of Mr. Taylor, who was not at all times on the board. Even Mr. Schofield seems to have been aware of the fact, and Mr. Taylor recognised it, as will be seen in the events of a year later. It is to be remembered that the directors of the company were personally or as representatives of the society the whole shareholders and that the company was a private company. No appeal to a shareholders' meeting would alter the situation because the composition of board and shareholders' meeting would be the same.

The recession deepened through the major part of 1952 and manufacture by the mill for the company was non-existent. It would seem likely that the recession was felt by other mills of the society than Falkland Mill, but a veil is drawn over much of the society's and the petitioners' activities in 1952 by the exclusion from probation by the Court of Session of inquiry into certain happenings of which complaint was made by the petitioners in their pleadings.

In June, 1952, cotton control was abolished. This has a material effect on what followed for it left the society free to procure rayon yarn and weave rayon cloth without any licences. No orders had passed from the company to Falkland Mill since 1951. But trade began to pick up in the autumn of 1952 and it is clear that Dr. Meyer was anxious for the mill to resume weaving for the company. The mill itself was at a low ebb. There were no looms working on rayon cloth. It was impossible, however, for Mr. Schofield and Dr. Meyer to come to terms on prices. On November 15, 1952, Dr. Meyer writes to the mill: "We feel most unhappy to place our order somewhere else "while not all of your looms are working. Please do recalculate "your prices again." On November 20, he writes: "We are "very reluctant to place an order with some other firms while "your looms are standing idle," and suggests a small order of some 16,000/17,000 yards "so that we can start business again "and then we can review the position from time to time and "see if we can carry on or not. This would at least, even if we "both worked without any profit at all, mark the beginning." Mr. Schofield quoted prices of 1s. 7d. a yard and 1s. 9½d. a yard for two qualities of cloth, which Dr. Meyer was unable to accept, and on December 4 Dr. Meyer is writing again: "I feel very "sorry indeed that you are unable to accept an order from us "after so many years of co-operation." On the same date Mr. Schofield was writing to the convener of the drapery and furnishing committee of the society, following on an interview with them two days earlier, in which he presents the mill's point of view and concludes: "We are in desperate need of "work for these rayon looms at the present time, and in view "of the foregoing circumstances, we consider that we are "receiving unfair treatment from the Scottish Textile and Manu-"facturing Co. Ltd." This letter was never disclosed to the petitioners, though it may well have been known to the company's society nominees, and it is, I think, significant that it should have been written at a time when other plans were maturing. Shortly before this date the drapery department of the society had put Mr. Schofield in touch with a department of the society, formed about a year before, known as the merchant converting department. This was a department which carried on a business similar to that of the company. In other words, it included the business of buying materials and dyeing, finishing or otherwise processing them for sale to customers. The proposal was that the mill should supply the merchant converting department with a variety of woven goods for converting, including rayon cloth. This idea came to fruition and the first experimental order for rayon cloth was placed on December 11, 1952, and the first bulk order in April, 1953. For the year 1953 £2,167 worth of rayon cloth was supplied by the mill and for the year 1954 £11,776 worth. From transfer invoices produced for these years it is shown that a line of rayon cloth known as 1009 was throughout debited by the mill to the merchant converting department at 1s. 6½d. a yard. The lowest price quoted by Mr. Schofield to the company for this quality on November 24, 1952, was 1s. 7d. a yard, and Dr. Meyer was never able to secure a better quotation. Indeed, much later, in July, 1953, when the society was not prepared to provide cloth for the company except on a weaving commission basis, Mr. Schofield was quoting prices which, on a manufacturing basis, worked out as high as 1s. 9½d. a yard. In December, 1952, when Dr. Meyer was endeavouring to resume business with the mill he was able to buy this quality cloth from other sources at about 1s. 5⅝d. and from a merchant converter at 1s. 6¼d. In these circumstances, the judges of the First Division all took the view that there was a policy on the part of the society to starve the company of cloth, and I do not find it possible, in the circumstances proved, to differ from this view. It is said that during 1953 and 1954 the society made a contribution to the mill to make up for the alleged uneconomic price charged by the mill against the merchant converting department. But, like Lord Sorn, I find the evidence on this very unsatisfactory and unconvincing. The allowance, for which no specific figures can be shown in the books of the society, would seem to have been given, if at all, in respect of the conversion at the mill of looms that had nothing at all to do with the weaving of rayon. Likewise, I discard the costing evidence given to support the prices quoted by Mr. Schofield to the company. It falls with the other evidence and it seems that, in any case, it is based on reduced production at the mill, whereas Dr. Meyer was anxious to get the mill back to a state of full production. I find it difficult to appreciate how, if Dr. Meyer was unable to compete on the mill's quotations in a competitive market, the society would be able to compete, unless it be that the society enjoyed a quasi monopoly in the retail co-operative world.

The next chapter in this unfortunate history opens with the month of January, 1953. In that month Dr. Meyer and Mr. Lucas had a meeting with Mr. Taylor, one of the society's representatives and fellow director, with whom Dr. Meyer was on friendly personal and social relations. Dr. Meyer says Mr. Taylor told him: " They want to get you out and to destroy the " company and you have no chance at all," and Mr. Lucas gave evidence to the same effect. Though Mr. Taylor denies using this language, Lord Carmont accepts it as true, and it certainly fits in with the surrounding facts and circumstances at the time. About the same time Mr. Taylor drafted a letter which he suggested the petitioners should send to the society. It was not sent, as will be seen, but it shows Mr. Taylor's recognition of the existing situation. It opens: " I explained to you [the society's " secretary] on Friday afternoon how unhappy Mr. Lucas and I " have been recently because of the strained relations in our " board." After a reference to the impossibility of re-establishing harmony and offering their shares to the society it proceeds: " You will understand how reluctant we are to take " this step as we have been together associated with Scottish " Textiles since it was formed and we feel we are making it a " success as the records will show. However, it is quite " impossible to carry on in the present atmosphere and this " decision is forced upon us." The letter, dated January 27, 1953, that was sent by Dr. Meyer was couched in somewhat different language and in particular refers to a price to be negotiated for the petitioners' shares. It runs:

" Dear Mr. Stirling,

" In our conversation last Friday we covered all events from " the negotiations regarding the ratio of shareholding up to today.

"I explained to you how the very harmonious and friendly "relations which were the guiding principle in all our dealings "started to deteriorate rapidly, and certain actions taken during "the last fifteen months did serious harm to our prosperity and "goodwill.

"Mr. Lucas and myself regret this turn of events most "deeply as it affects not only our livelihood which we built up "with so much pain and labour, but also our sentiment and "affection which we gave wholeheartedly to the co-operative idea "in spirit and actions.

"In spite of all these happenings we still feel that a friendly "settlement is very much desired at least from our side and "we have therefore decided to offer to you our shareholding of "3900 shares at a price to be negotiated between us.

"As we have to take certain important decisions very soon "we would be grateful if you could let us have your views as "soon as possible.

"Yours truly,
"(Sgd.) GEORGE MEYER."

Following on this letter Dr. Meyer and Mr. Lucas had a meeting with the society's finance sub-committee, when it was indicated to them that as they wished to give up their interest in the company it might be voluntarily liquidated. Dr. Meyer stated that in that case the goodwill would be lost, that they had had no desire to bring about the present position and they were not going to give up their shares at a liquidation value and, in their opinion, they should be paid 96s. a share. They were prepared to stay on after selling their shares to the society. At a meeting of the society's board on February 9, 1953, it was minuted that the finance sub-committee and the furnishing committee had met and agreed that the company "had served its "purpose" and should, if possible, be put into voluntary liquidation. The interview with Dr. Meyer and Mr. Lucas was then referred to and a recommendation of the finance sub-committee approved that a reply be sent to Dr. Meyer indicating that the society did not wish to accept his offer to sell the shareholding of Mr. Lucas and himself "at the present time." The purpose which the company had served was plain. It was introducing rayon production to the society, as Mr. Nicholson, one of the society's directors, himself said in evidence.

The petitioners knew nothing of the terms of this minute or of the decision by the two sub-committees that the company had served its purpose. But they did receive a letter dated February 9, 1953, stating that the society did not wish "at the present "time" to accept the offer to sell to them the petitioners' shares. After that, according to Dr. Meyer, the petitioners were refused access to the company's books. There followed a letter from the petitioners' solicitors to the society, dated February 19, threatening proceedings under section 210 if the petitioners' shares were not taken over at £6 0s. 11d. a share. The petitioners continued to carry on in the company while attempts were made to resolve the differences between the parties. These, however, came to nothing and the present proceedings were commenced on July 14, 1953. The petitioners still remained with the company. Business, however, was at a low ebb, and on August 24, 1953, the board passed a resolution that their employment as managing directors should terminate on November 30, 1953. They were, I think, still anxious to do what they could to promote the trade of the company and conserve its goodwill and did in fact do some business through other sources than the mill. Under their agreement, they were in any case bound to do so and had been told to do so at a board meeting on August 24, 1953. But excessively high commission weaving rates quoted by Mr. Schofield prevented business on any scale being done with the mill and disputes arose also with regard to a special order where the price charged was of no consequence. The evidence suggests to me the continuance of a policy of hostility to and discouragement of the petitioners by the society. This period produces an instance of support of the petitioners by their fellow directors. Following a meeting of the company's board on October 5, 1953, at which Dr. Meyer complained of the rates quoted by the mill, the company's secretary, on the board's authority, wrote to the society's secretary that "my board would like to inquire if there "is any possibility of the quoted commission weaving charges "from the linen works, Falkland, being reduced," an inquiry which produced a reply in the negative. But this, it seems to me, was but an idle gesture. Litigation was in progress, the company's conduct was under the scrutiny of the court, and the mill, to the knowledge of the society's representatives, was now in active production for the merchant converting department.

My Lords, all the judges of the First Division take the view that it was the deliberate policy of the society in the later years of its history to depress the value of the company's shares by starving it of supplies and some of them would date the genesis of this policy from the events at the end of 1951 and beginning of 1952, when the society found itself unable to obtain an adjustment of its holding at par. There is, I think, no positive conduct proved to support that view before June, 1952, when cotton control was abolished, but from that date there was an opportunity afforded to the society to pursue such a policy, if they had already entertained it, and I think, as events showed, they did in fact then adopt such a policy. The crucial evidence is that bearing on the trading relations between the mill and the merchant converting department, on the one hand, and the mill and the company, on the other. I have already narrated the facts and, in my opinion, there was started in the autumn of 1952 a policy which took effect in 1953 of utilising the rayon looms in the mill for the production of cloth for the merchant converting department and shutting off the company from its ordinary source of supply. This was done, not by refusing orders from the company, but by quoting to the company prices at which it could not hope to compete in the selling market. While the society were at pains to show that because of the costs of production they could not quote lower prices, the fact remains that throughout the whole of 1952 and 1953 cloth was being passed from the mill to the merchant converting department at prices which, for at least bookkeeping purposes, were being noted at a figure per yard materially lower than that quoted to the company. It is in evidence that the various trading departments of the society were regarded as separate entities expected to show results on a commercial basis. If that meant that the society was content that the mill should work at a loss in order that the merchant converting department should work at a profit, that only means that it allowed the mill to show favour to the merchant converting department which it could equally have shown to its old customer the company. But I prefer the view that the mill was giving the merchant converting department rayon cloth at prices which it was prepared to quote on an ordinary commercial and competitive basis. I have already dealt with the evidence by which the society seeks to escape this natural inference. Mr. Schofield's own evidence was that he was expected to show a profit at his mill. It is to be remembered that the company was, shortly before, giving full employment to the rayon looms and that, if it had been allowed the opportunity to place orders after the recession passed, there was every reason to think it would do so again. According to the evidence trading prospects were good and the results shown in the production of rayon for the merchant converting department bear out this evidence. According to a report of the manager of the drapery department dated August 8, 1953, the cost prices of the mill were based on covering overheads on reduced production and it was anticipated "that if full "productive capacity can be obtained mill cost prices will be "lowered."

From the company's point of view, the position was very serious. It had become dependent on the mill for its supplies of cloth. At the height of its prosperity 94 per cent. of its cloth was obtained from the mill. When trade revived in 1953 other sources on any scale were not available to the company. Manufacturers were busy supplying their regular customers. The position was so minuted by the company as the opinion of the managing directors on August 24, 1953. Mr. Schofield agrees that it was difficult for the company to obtain woven cloth in any quantities outside Falkland and that the company had been tied to Falkland for its rayon cloth. On the other hand, the society had the formulae, connections, and technical knowledge introduced to the mill by the company through Dr. Meyer, and the equipment and workers to manufacture the cloth free from any controls. For practical purposes the mill had started as being, on the rayon weaving side, the company's mill, a substitute for a mill owned by or leased to the company. The rayon weaving looms had now been diverted to the purposes of the society which was enjoying the monopoly which had previously belonged to the company. In the circumstances prevailing, this spelt death to the company. A very significant situation arose in August, 1953, when Dr. Meyer found the commission weaving rates quoted by Mr. Schofield impossible of acceptance. When the secretary of the company wrote on August 19: "As a result of this no production is being undertaken on behalf of this company and its "activities are brought almost to a standstill," the society, at a board meeting on August 24, decided to make no reduction in the commission charge. In their minute there appears this passage: "Another factor which affects the situation is that increasing "orders are being received from the merchant converting department of the drapery department, and an increasing number of "looms are being devoted to that work so that our manager does "not feel himself pressed to cut his price to the limit as he was "towards the end of last year when work was very difficult to "get."

Lastly, on the facts, it is to be noted that while the society's directors of the company, who were also directors of the society, knew all that was happening within the society, Dr. Meyer and

Mr. Lucas knew nothing apart from what they could infer from the communications, verbal and written, which they had received, with reference to the alignment of the shareholding and the taking over of shares from the petitioners, and the general attitude of the society's directors on the company's board. On the vital matters affecting the company's prosperity known to the nominee directors these directors remained silent, concealed the facts from the petitioners and took no action and gave no advice helpful to the company. As Lord Sorn put it, their conduct as directors was a negative one to "let the company drift towards "the rocks."

My Lords, if the society could be regarded as an organisation independent of the company and in competition with it, no legal objection could be taken to the actions and policy of the society. Lord Carmont pointed this out in the Court of Session. But that is not the position. In law the society and the company were, it is true, separate legal entities. But they were in the relation of parent and subsidiary companies, the company being formed to run a business for the society which the society could not at the outset have done for itself, unless they could have persuaded Dr. Meyer and Mr. Lucas to become servants of the society. This the petitioners were not prepared to do. The company, through the knowledge, the experience, the connections, the business ability and the energies of the petitioners, had built up a valuable goodwill in which the society shared and which there is no reason to think would not have been maintained, if not increased, with the co-operation of the society. The company was in substance, though not in law, a partnership consisting of the society, Dr. Meyer and Mr. Lucas. Whatever may be the other different legal consequences following on one or other of these forms of combination one result, in my opinion, followed in the present case from the method adopted, which is common to partnership, that there should be the utmost good faith between the constituent members. In partnership the position is clear. As stated in Lindley on Partnership, 11th ed., p. 401: "A partner cannot, without the consent of his co-"partners lawfully carry on for his own benefit, either openly or "secretly, any business in rivalry with the firm to which he "belongs." It may not be possible for the legal remedies that would follow in the case of a partnership to follow here, but the principle has, I think, valuable application to the circumstances of this case.

In these circumstances, I have no doubt the conduct of the society was oppressive. The only question is: was it oppressive in the affairs of the company? At a previous stage of this case when relevancy was under consideration the late Lord President Cooper said [5]: "The truth is that, whenever a subsidiary is "formed as in this case with an independent minority of share-"holders, the parent company must, if it is engaged in the same "class of business, accept as a result of having formed such a "subsidiary an obligation so to conduct what are in a sense its "own affairs as to deal fairly with its subsidiary." I would adopt this statement with this expansion, that conducting what are in a sense its own affairs may amount to misconducting the affairs of the subsidiary. It is difficult to say that misconduct in the affairs of the subsidiary is not conduct in the affairs of the subsidiary and that, I think, is what Lord Cooper had in mind. Misconduct in the affairs of a company may be passive conduct, neglect of its interests, concealment from the minority of knowledge that it is material for the company to know. That, in my opinion, is what happened here. Nor do I think what I have said is materially different from the views expressed by all their Lordships in the Court of Session. The Lord President considered [6] that there was a policy by the society's nominees on the company's board of "uniform silence" in face of the progressive deterioration in the company's activities; of failure to disclose to the petitioners the explanation of the deterioration; unwillingness to encourage the company to seek other manufacturers, leading to the conclusion that the society was extending to the conduct of the affairs of the company the same policy that was being operated by the society itself. Lord Carmont considered that the society's nominees conducted the affairs of the company oppressively as from the time when being aware of the society's policy they continued to sit on the company's board and to control its affairs. "They could not," he says,[7] "in the circumstance of their "relation to the society be anything other than active, or at best "passive, supporters of the society's policy when dealing with the "company's affairs, and even their continuance in office as "directors of the company put an obstacle in the way of the "minority taking early and perhaps some timeous action to save "the company, or at all events to maintain in whole or in part "the value of the company's shares." Lord Russell held [8] that they "acted in the interests of the society and against the

[5] 1954 S.C. 381, 391.

[6] 1957 S.C. 110, 136.

[7] Ibid. 136.

[8] Ibid. 145.

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Lord Keith of Avonholm.

" interests of the company by adopting a policy of masterly " inactivity and allowing the company's trading activities to " decline to vanishing point." Lord Sorn's view was [9] that the society as majority shareholders controlling the company " made " use of its control to ensure that the company remained passive " under the attack and did not have an opportunity to struggle " for its existence "; that they failed in their duty of raising " the " question of looking for another source of supply as an urgent " question of policy "; and that, when the policy of liquidation had been expressly approved by the society's board, " the " nominee directors still did nothing and let the company drift " towards the rocks."

My Lords, these views indicate that the conduct of the society on the company's affairs was negative conduct. That, in a sense, is true, for it is just the other side of the shield from that which displayed the society acting positively to destroy the company. But I cannot think that where directors, having power to do something to save a company, lie back and do nothing, they are not conducting the affairs of the company, perhaps foolishly, perhaps negligently, perhaps with some ulterior object in view. They are certainly conducting the affairs of the company in breach of their duty as directors. In the present case I would go further, for I think that the production of rayon cloth at the mill was an affair of the company and that the society being majority shareholder in the company cannot claim that in diverting this production to itself and obstructing supplies to the company it was acting for itself and not conducting the affairs of the company in a manner unfair and oppressive to the minority shareholders. It was said that the company should have secured its rayon cloth from the mill by a contract. But that is beside the point, looking to the special relationship between the company and the society. A partner who starts a business in competition with the business of the partnership without the knowledge and consent of his partners is acting contrary to the doctrine of utmost good faith between partners. He is also acting in a manner which, I think, may be regarded as oppressive to his partners for he is doing them an injury in their business. In the same way there was here, in my opinion, oppression by the society of the minority shareholders and it was, I consider, oppression in the conduct of the affairs of the company. Oppression under section 210 may take various forms. It suggests, to my mind, as

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[9] 1957 S.C. 154–155.

I said in *Elder* v. *Elder and Watson*,[10] a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members. The section introduces a wide power to the court to deal with such a situation in an equitable manner which it did not have in the case of a company prior to the passing of the Act of 1948. The court has here acted, in my opinion, within the powers conferred upon it.

It was said that appeal could not be made to section 210 unless the company had a continuing life ahead of it and here it was clear that the company would have to be wound up. But that means that if oppression is carried to the extent of destruction of the business of the company no recourse can be had to the remedies of the section. This would be to defeat the whole purpose of the section. The present position is due to the oppression and but for the oppression it must be assumed that the company would be an active and presumably flourishing concern. The section is, in my opinion, very apt to meet the situation which has arisen.

It was contended that the value of £3 15s. put upon the shares was excessive. I see no reason for altering this figure. Lord Sorn has, in my opinion, approached this matter on a correct principle, by considering what would have been the value of the shares at the commencement of the proceedings had it not been for the effect of the oppressive conduct of which complaint was made. This is clearly not a matter on which a calculation can be made with mathematical accuracy or by the application of strict accounting principles and the figure fixed by the court is well below the figure fixed by the auditors in February, 1952, and the price suggested by Dr. Meyer in February, 1953.

I would dismiss the appeal.

Lord Denning. My Lords, I had myself prepared a summary of the material facts in this case but, in view of the comprehensive statement by my noble and learned friend, Lord Keith of Avonholm, I will not burden your Lordships with what I had written. I would only say that I am sorry that the events of 1952 were excluded as irrelevant. Dr. Meyer and Mr. Lucas from the very beginning put those events in the forefront of their complaints. They did so in the first letter of their solicitors dated February 19, 1953, and in the original petition lodged on July 14, 1953. The burden of their complaints was that, when there was a recession in 1952 in the rayon trade, they—Dr. Meyer and Mr. Lucas—tried, on behalf of the textile company, to develop trade in other goods: particularly in the export of woollen materials to Germany (where they had valuable trade connections) and in a large export order for £60,000: but that they were thwarted in their efforts by the actions of two of the nominee directors, who tried to get the trade for the Scottish Co-operative Wholesale Society itself. Whether these complaints be true or not your Lordships cannot know—because these allegations were excluded from probation. But your Lordships have, I think, sufficient material to decide the case on the other facts which were proved.

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[10] 1952 S.C. 49, 60.

The complaints which were established were, I think, these: The co-operative society set up a competing business. It established its own merchant converting department, engaged in the rayon trade itself, and quoted more favourable terms to its own department than it did to the textile company. It is said that the co-operative society did this with intent to injure the textile company—to depress the value of its shares so that the co-operative society could get them cheap—but I would not myself go as far as this. It seems to me that the co-operative society all the time was seeking to promote its own interests. It was ready in 1946 to enlist the co-operation of Dr. Meyer and Mr. Lucas when they were useful to it—so as to get an introduction into the rayon trade—but it was ready to throw them over when they were no longer useful. By which I mean that it was ready to withdraw all support from them. That was, I think, the state of mind of the co-operative society right from the moment in November, 1951, when Dr. Meyer and Mr. Lucas refused to realign the shares at par. At that time the rayon trade was in a recession and Dr. Meyer and Mr. Lucas were not of so much use to the society as they had been. By the time the rayon trade revived, the controls were off and the co-operative society was able to engage in rayon production itself—and it had no further need of Dr. Meyer and Mr. Lucas or of the textile company. It had its own department for rayon. So the textile company could go to the wall. It had "served its purpose"—or rather the purpose of the co-operative society—and could be let go into liquidation. The co-operative society had not the voting power to put it into voluntary liquidation. But liquidation might come about by sheer inanition. So it came about that, when Dr. Meyer and Mr. Lucas in January, 1953, offered to sell their shares to the co-operative society at a price to be negotiated (mentioning 96s.),

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the co-operative society refused "at the present time." The co-operative society thought, perhaps, that, if they waited, sooner or later liquidation would come about, or that terms of purchase would be arranged later more favourable to the co-operative society than paying 96s. a share.

Such being "the matters complained of" by Dr. Meyer and Mr. Lucas, it is said: "Those are all complaints about the "conduct of the co-operative society. How do they touch the "real issue—the manner in which the affairs of the textile company were being conducted?" The answer is, I think, by their impact on the nominee directors. It must be remembered that we are here concerned with the manner in which the affairs of the textile company were being conducted. That is, with the conduct of those in control of its affairs. They may be some of the directors themselves, or, behind them, a group of shareholders who nominate those directors or whose interests those directors serve. If those persons—the nominee directors or the shareholders behind them—conduct the affairs of the company in a manner oppressive to the other shareholders, the court can intervene to bring an end to the oppression.

What, then, is the position of the nominee directors here? Under the articles of association of the textile company the co-operative society was entitled to nominate three out of the five directors, and it did so. It nominated three of its own directors and they held office, as the articles said, "as nominees" of the co-operative society. These three were therefore at one and the same time directors of the co-operative society—being three out of 12 of that company—and also directors of the textile company—three out of five there. So long as the interests of all concerned were in harmony, there was no difficulty. The nominee directors could do their duty by both companies without embarrassment. But, so soon as the interests of the two companies were in conflict, the nominee directors were placed in an impossible position. Thus, when the realignment of shareholding was under discussion, the duty of the three directors to the textile company was to get the best possible price for any new issue of its shares (see *per* Lord Wright in *Lowry* v. *Consolidated African Selection Trust Ltd.*[11]), whereas their duty to the co-operative society was to obtain the new shares at the lowest possible price—at par, if they could. Again, when the co-operative society determined to set up its own rayon department, competing with the business of the textile company, the duty of the three directors to the textile company was to do their best to promote its business and to act with complete good faith towards it; and in consequence not to disclose their knowledge of its affairs to a competitor, and not even to work for a competitor, when to do so might operate to the disadvantage of the textile company (see *Hivac Ltd.* v. *Park Royal Scientific Instruments Ltd.*[12]), whereas they were under the self-same duties to the co-operative society. It is plain that, in the circumstances, these three gentlemen could not do their duty by both companies, and they did not do so. They put their duty to the co-operative society above their duty to the textile company in this sense, at least, that they did nothing to defend the interests of the textile company against the conduct of the co-operative society. They probably thought that "as nominees" of the co-operative society their first duty was to the co-operative society. In this they were wrong. By subordinating the interests of the textile company to those of the co-operative society, they conducted the affairs of the textile company in a manner oppressive to the other shareholders.

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[11] [1940] A.C. 648, 679; 56 T.L.R. 735; [1940] 2 All E.R. 545.

It is said that these three directors were at most only guilty of inaction—of doing nothing to protect the textile company. But the affairs of a company can, in my opinion, be conducted oppressively by the directors doing nothing to defend its interests when they ought to do something—just as they can conduct its affairs oppressively by doing something injurious to its interests when they ought not to do it.

The question was asked: What could these directors have done? They could, I suggest, at least on behalf of the textile company, have protested against the conduct of the co-operative society. They could have protested against the setting up of a competing business. But then it was said: What good would that have done? Any protest by them would be sure to have been unavailing, seeing that they were in a minority on the board of the co-operative society. The answer is that no one knows whether it would have done any good. They never did protest. And it does not come well from their mouths to say it would have done no good, when they never put it to the test. See the decision of this House in *Morison, Pollexfen & Blair Ltd.* v. *Walton*,[13] as described by Scrutton L.J. in *Coldman* v. *Hill*.[14]

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[12] [1946] Ch. 169; 62 T.L.R. 231; [1946] 1 All E.R. 350.

[13] (1909) May 10 (unreported); see [1915] 1 K.B. 90.

[14] [1919] 1 K.B. 443, 457; 35 T.L.R. 146.

Even if they had protested, it might have been a formal gesture, ostensibly correct, but not to be taken seriously.

Your Lordships were referred to *Bell* v. *Lever Brothers Ltd.*,[15] where Lord Blanesburgh said that a director of one company was at liberty to become a director also of a rival company. That may have been so at that time. But it is at the risk now of an application under section 210 if he subordinates the interests of the one company to those of the other.

So I would hold that the affairs of the textile company were being conducted in a manner oppressive to Dr. Meyer and Mr. Lucas. The crucial date is, I think, the date on which the petition was lodged—July 14, 1953. If Dr. Meyer and Mr. Lucas had at that time lodged a petition to wind up the company compulsorily, the petition would undoubtedly have been granted. The facts would plainly justify such an order on the ground that it was "just and equitable" that the company should be wound up: see *In re Yenidje Tobacco Co. Ltd.*[16] But such an order would unfairly prejudice Dr. Meyer and Mr. Lucas because they would only recover the break-up value of their shares. So instead of petitioning for a winding-up order, they seek to invoke the new remedy given by section 210 of the Companies Act, 1948. But what is the appropriate remedy? It was said that section 210 only applies as an alternative to winding up and that an order can only be made under section 210 if the company is fit to be kept alive: whereas in this case the business of the company was virtually at an end when the petition was lodged, and there was no point in keeping it alive. If the co-operative society were ordered, in these circumstances, to buy the shares of Dr. Meyer and Mr. Lucas, this would amount, it was said, to an award of damages for past misconduct—which is not the remedy envisaged by section 210.

Now, I quite agree that the words of the section do suggest that the legislature had in mind some remedy whereby the company, instead of being wound up, might continue to operate. But it would be wrong to infer therefrom that the remedy under section 210 is limited to cases where the company is still in active business. The object of the remedy is to bring "to an end the "matters complained of," that is, the oppression, and this can be done even though the business of the company has been brought to a standstill. If a remedy is available when the oppression is so moderate that it only inflicts wounds on the company, whilst leaving it active, so also it should be available when the oppression is so great as to put the company out of action altogether. Even though the oppressor by his oppression brings down the whole edifice—destroying the value of his own shares with those of everyone else—the injured shareholders have, I think, a remedy under section 210.

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[15] [1932] A.C. 161, 195; 48 T.L.R. 133.

[16] [1916] 2 Ch. 426; 32 T.L.R. 709.

One of the most useful orders mentioned in the section—which will enable the court to do justice to the injured shareholders—is to order the oppressor to buy their shares at a fair price: and a fair price would be, I think, the value which the shares would have had at the date of the petition, if there had been no oppression. Once the oppressor has bought the shares, the company can survive. It can continue to operate. That is a matter for him. It is, no doubt, true that an order of this kind gives to the oppressed shareholders what is in effect money compensation for the injury done to them: but I see no objection to this. The section gives a large discretion to the court and it is well exercised in making an oppressor make compensation to those who have suffered at his hands.

True it is that in this, as in other respects, your Lordships are giving a liberal interpretation to section 210. But it is a new section designed to suppress an acknowledged mischief. When it comes before this House for the first time it is, I believe, in accordance with long precedent—and particularly with the resolution of all the judges in *Heydon's* case [17]—that your Lordships should give such construction as shall advance the remedy. And that is what your Lordships do today.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Martin & Co. for Gray, Muirhead & Carmichael, W.S., Edinburgh, and Keyden, Strong & Co., Glasgow; Cole & Matthews for Kinnear & Beatson, W.S., Edinburgh, and Wilson, Chalmers & Hendry, Glasgow.*

F. C.

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[17] (1584) 3 Co.Rep. 7a.

[HOUSE OF LORDS.]

H. L. (E.)* REGIS PROPERTY CO. LTD. . . . APPELLANT;

AND

DUDLEY . . . . RESPONDENT.

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July 28,
29, 30;
Oct. 21;
Nov. 6.

Landlord and Tenant — Rent restriction — Rent limit — Appropriate factor—Tenant's liability for repairs under terms of tenancy—Concurrent liability at common law—"Fair wear and tear"—Services—Rent Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *ss.* 1, 2, *Sch. I, para.* 1 (1) (2) *and* (3).

Landlord and Tenant—Repairs—Covenant—"Fair wear and tear"—Meaning.

By section 1 (1) of the Rent Act, 1957, "the rent recoverable "for any rental period from the tenant under a controlled "tenancy shall not exceed . . . a rent of which the annual rate "is equal to the 1956 gross value of the dwelling multiplied by "two (or, if the responsibility for repairs is such as is specified "in Part I of the First Schedule to this Act, by the appropriate "factor specified in the said Part I). . . ."

By Part I of Schedule I: "1—(1) The following provisions "shall have effect in ascertaining the rent limit by reference to the "1956 gross value. (2) If under the terms of the tenancy the "tenant is responsible for all repairs, the appropriate factor shall "be four-thirds. (3) If under the terms of the tenancy the tenant "is responsible for some, but not all, repairs, the appropriate "factor shall be such number less than two but greater than "four-thirds as may be . . . determined by the county court."

The landlords of a block of flats in London applied to the county court to determine the increase of rent permissible under the Act in respect of one of the flats let unfurnished at an inclusive rent of £139 16s. 9d. a year, which, owing to an increase of rates, had been increased to £145 12s. 5d. The tenant's obligations to repair under the lease were to keep the interior of the flat in good and substantial repair and clean sanitary condition, fair wear and tear and damage by accidental fire excepted. The judge fixed the appropriate factor at 1⅔, holding that the liability of the landlords and of the tenant for repairs was about equal:—

Held (Lord Keith of Avonholm and Lord Denning dissenting) that the judge had not erred in principle in fixing the appropriate factor. Even though some items of repair might be made necessary by the act of the tenant for which he could be made liable at common law, yet, if he was also liable for it under the terms of the tenancy, he was to be regarded as responsible for it for the purpose of determining the appropriate factor, since the court was concerned

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD DENNING.

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only with his responsibility expressed by the terms of the tenancy. For the purpose of the determination a hypothetical tenant was to be assumed who was reasonably careful in his user of the premises, but that did not import a tenant who was never guilty of any act of negligence.

Held, further, unanimously, that the judge did not err in crediting the tenant with more than a nominal amount in respect of his liability to repair, in view of the "fair wear and tear" exception. The exemption covered no more than the remedying of things which wear out in the course of reasonable use; it did not cover other damage which flowed from the wear and tear.

Dictum of Talbot J. in *Haskell* v. *Marlow* [1928] 2 K.B. 45, 58; 44 T.L.R. 171 approved.

Taylor v. *Webb* [1937] 2 K.B. 283; 53 T.L.R. 377; [1937] 1 All E.R. 590 questioned.

Decision of the Court of Appeal [1958] 1 Q.B. 346; [1958] 2 W.L.R. 356; [1958] 1 All E.R. 510 affirmed.

APPEAL from the Court of Appeal (Jenkins, Sellers and Pearce L.JJ.).

This was an appeal from an order of the Court of Appeal dated February 7, 1958, dismissing the appeal of the appellants, Regis Property Co. Ltd., from the order of Judge Hargreaves dated August 29, 1957, whereby it was ordered and declared that the appropriate factor, by which the gross value of certain premises known as Flat 248, Chelsea Cloisters, S.W.3, in the County of London, of which the appellants were landlords and the respondent, Thomas Henry Dudley, was the tenant, was to be multiplied for the purpose of ascertaining the rent limit applicable thereto, was five-thirds.

The facts and the relevant statutory enactments were stated by Lord Morton of Henryton as follows: The appellants were the owners of a large block of flats known as Chelsea Cloisters, comprising 804 residential flats of which 679 were let on unfurnished tenancies. The respondent was the tenant of one of those flats, No. 248, which was let to him unfurnished by a written tenancy agreement dated April 10, 1956. The flat consisted of two rooms, a kitchenette, hall and bathroom, with a radiator in each of the two rooms, a heated towel rail and a watercloset in the bathroom and a wash-basin and sink with hot and cold water taps in the bathroom and kitchenette respectively. The total area of the flat was 310 sq. ft.

The gross and rateable values of the flat were at all material times £54 and £39 respectively. By reason of its rateable value the flat was a dwelling-house controlled by the Rent and Mortgage

Interest Restrictions Acts, 1920 to 1939, and continued to be controlled after the coming into force of the 1957 Act.

By the tenancy agreement, the appellants let the flat to the respondent, together with the use of all the fixtures and fittings therein, on a tenancy from month to month from April 1, 1956, at the yearly rent of £139 16s. 9d. At the commencement of these proceedings the rent had been increased to £145 17s. 5d. by reason of increases in rates. The tenancy agreement provided (inter alia) as follows:

"2. The tenant hereby agrees with the landlord: . . .

"(C) To keep the interior of the flat together with all the "fixtures and fittings now or hereafter therein (including the "doors windows sanitary and water apparatus thereof) in good "and substantial repair and clean sanitary condition (fair wear "and tear and damage by accidental fire excepted), and so to "deliver up at the end or sooner determination of the tenancy:

"(D) To forthwith comply with any notice that may be "given by the landlord requiring any breach of any of the "obligations on the part of the tenant under the last preceding "clause to be made good Provided that if the tenant shall "make default for a period of one month in complying with "such notice it shall be lawful for the landlord (but without "prejudice to the right of re-entry hereinafter contained) to "enter upon the flat and execute the repairs at the expense of "the tenant in accordance with the provisions hereof and the "expenses of such repairs shall be repaid by the tenant to the "landlord on demand:

"(E) To observe and perform the rules and regulations "specified in the Schedule hereto or any reasonable modifications thereof or additions thereto made from time to time by "the landlord for the proper conduct of the building and of "which notice shall be given to the tenant in writing or left "for the tenant at the flat. The tenant shall accept as final "and binding the landlord's decision upon any matter arising "out of the said rules and regulations or any such modifications "thereof or additions thereto:

"(F) Not without the previous consent in writing of the "landlord to alter or interfere with the construction or arrangement of the flat or the fixtures or fittings therein belonging to "the landlord or for which the landlord is responsible or alter or "injure any of the walls floors ceilings wiring pipes or drains "of the flat or alter the colour of any painted woodwork and if "the tenant shall carry out any redecoration or other work he "shall properly prepare all woodwork before painting and strip "or properly prepare all walls and ceilings before papering or "distempering:"

"Schedule of Rules and Regulations

"1. Tenants shall keep all baths sinks cisterns and waste and "other internal pipes in or connected with their flats clean and "open and in proper repair and order and shall be responsible for "all damage occasioned to their own or other flats through any "breach of this rule or through the improper use or negligence "of themselves or their servants or through the stopping up "or bursting of the said baths sinks cisterns or pipes due to "the negligence of the tenants or their servants and shall carry "out during the tenancy any works required to the internal "water pipes fittings apparatus etc., to comply with any notices "served by the Metropolitan Water Board or the local sanitary "authority."

At some time within a year before the commencement of the proceedings herein Plus Flats Management Ltd., the managing agents of the appellants, caused a circular letter in the following terms to be delivered to the tenants at Chelsea Cloisters:

"Dear Sir or Madam,

"re Water Taps

"In cases where taps require washering (that is to say where "water continues to drip when the tap is turned off) or re-seating "(where there is noise or vibration when the tap is turned) "tenants are particularly requested to report this to the porter's "lodge, when the landlords will be pleased to effect repairs with-"out charge to the tenant."

On July 6, 1957, the Rent Act, 1957, came into force and introduced a limit on the rent recoverable in respect of houses let under a controlled tenancy, which was to be ascertained on a different basis from that laid down in previous Rent Acts. The provisions of the 1957 Act which were material to this appeal were as follows: Section 1 (1): "Subject to the following provisions "of this Act the rent recoverable for any rental period from the "tenant under a controlled tenancy shall not exceed the following "limit, that is to say, a rent of which the annual rate is equal "to the 1956 gross value of the dwelling multiplied by two (or, "if the responsibility for repairs is such as is specified in Part I "of Schedule I to this Act, by the appropriate factor specified "in the said Part I), together with—(*a*) the annual amount, "ascertained in accordance with Schedule II to this Act, of any "rates for the basic rental period, being rates borne by the

" landlord or a superior landlord; and (*b*) such annual amount as " may be agreed in writing between the landlord and the tenant " or determined by the county court to be a reasonable charge " for any services for the tenant provided by the landlord or a " superior landlord during the basic rental period or any furniture " which under the terms of the tenancy the tenant is entitled to " use during that period."

(No question arose on this appeal under sub-paragraphs (*a*) and (*b*) as these matters had been agreed between the parties.)

Section 1 (2): " The limit on the rent recoverable under a controlled tenancy for any rental period (hereinafter referred to as " ' the rent limit ') shall be subject to adjustment from time to " time under sections 3 to 5 of this Act and to reductions " as provided by Part II of Schedule I to this Act in case of " disrepair."

Section 25 (so far as relevant) was in the following terms: " . . . ' appropriate factor ' means the number by which the 1956 " gross value is to be multiplied in determining the rent limit; " ' basic rental period ' means the rental period comprising the " commencement of this Act or, in the case of a controlled tenancy " beginning thereafter, the first rental period of the tenancy; " ' controlled tenancy ' means a tenancy to which Rent Acts " apply, or a statutory tenancy; ' dwelling ' except in section 16 " of this Act, means in relation to a controlled tenancy the aggregate of the premises comprised in the tenancy . . ."

Schedule I, Part I, provided: " 1.—(1) The following provisions shall have effect in ascertaining the rent limit by " reference to the 1956 gross value. (2) If under the terms of " the tenancy the tenant is responsible for all repair, the appropriate factor shall be four-thirds. (3) If under the terms of the " tenancy the tenant is responsible for some, but not all, repairs, " the appropriate factor shall be such number less than two but " greater than four-thirds as may be agreed in writing between " the landlord and the tenant or determined by the county " court."

(The present case came within paragraph 1 (3).)

Paragraph 2 (1) provided: " In the foregoing paragraph the " expression ' repairs ' does not include internal decorative " repairs . . ." The remainder of paragraph 2 related to internal decorative repairs, which were not relevant to this appeal.

Part II of Schedule I enabled a tenant, in the circumstances therein set forth, to obtain a " certificate of disrepair " from the local authority, with a consequential reduction of the "appropriate factor" to four-thirds while the certificate was in force.

No agreement was made between the parties, under paragraph 1 (3) of Schedule I, as to the appropriate factor for ascertaining the rent limit applicable to the flat and on July 22, 1957, the appellants issued an application in the West London County Court for a determination of the appropriate factor under paragraph 1 of Schedule I to the 1957 Act. At the hearing of the application expert evidence was called on behalf of the appellants and the respondent respectively with regard to the estimated yearly expenditure on repairs (other than internal decorative repairs) which would be incurred in respect of the flat, and the relative proportion thereof which would fall on the appellants and the respondent having regard to the repairing provisions of the tenancy agreement.

The judge accepted the evidence tendered on behalf of the appellants in part and the evidence tendered on behalf of the respondent in part, and held that the appellant landlords' liability for repairs should be estimated at £7 5s. per annum and the respondent tenant's liability at not less than £7 7s. per annum.

In the course of his judgment the judge said: "There is, "however, a further consideration that I am asked to take into "account regarding repairs arising through negligence, and it is "this. It is submitted that in construing this agreement it should "be assumed that the tenant will be a reasonably careful tenant, "that is to say, not a negligent one, and that the negligence clause "can therefore be disregarded. It might be possible to accept "this argument in the case of an agreement that was silent as to "the tenant's negligence. It might then, I think, be argued "that it should be assumed that when the agreement was drawn "up the landlord had in mind only tenants who would behave "with reasonable care, but this agreement is not silent; it quite "obviously assumes and takes into account the possibility that "the tenant or his servants may be negligent and it formulates "provisions to apply in such a case. I must, therefore, regard "the agreement as one that repudiates specifically the assump-"tion that tenants can be relied upon always to be careful. It "assumes instead that there may be some who are not."

After giving his reasons for arriving at the figure of £7 5s. per annum in respect of the landlords' liability, he continued as follows:

"In my view, however, the tenant's liability should be put "at a far higher figure than the £2 10s. that Mr. Dale allows, "even taking into account the fair wear and tear clause, as of "course I must do. My reason for forming this opinion is that "in the case of a flat such as this, where most of the fixtures "and fittings are metal or porcelain, or where all are indoors, "the fair wear and tear will be very small and may be regarded "in some cases as almost negligible. The main articles that "will have to be replaced by the landlord under the fair wear "and tear clause are the electric light bulbs and the washers on "the taps. These latter the landlord has specifically undertaken "to be responsible for by circulating the undated slip to which I "have already referred, although it appears to me that under the "fair wear and tear clause the landlord will be liable for this in "any case.

"The tenant, however, remains liable for all the rest of the "repairs inside the flat. I have in mind such items as the "following: (A) keeping waste pipes unblocked, and (B) repairing basins cracked by dropping articles into them, for example, "tooth glasses, bottles, hairbrushes or tumblers; breaking the "chain or the handle, or whatever the contrivance is, of the "lavatory cistern, chipping the bath enamel; repairing damage "to the walls, caused, for example, by driving in nails or Rawlplugs for pictures and photographs; breaking the bath panel "or a window pane; damage to the fittings of the kitchenette; "damage to the woodwork from cigarette ends, where more "serious than mere decoration can repair; and, more rarely, "damage from the flooding of his own or adjoining flats.

"All these are the sort of things that happen in flats, and they "cannot be regarded as fair wear and tear. I take the view that "even allowing for the fair wear and tear clause the tenant's "liability should be assessed at not less than £7 7s. per annum "in all. This view does not necessarily conflict with Mr. Dale's "figures, because tenants who do damage which is obviously not "fair wear and tear have no motive for reporting it, and are more "than likely to put it right without the landlord knowing anything about it. If they do report it the landlord's manager will "probably tell them that the landlord is not responsible for the "carelessness of the tenant.

"As I take the view, therefore, that as nearly as I can form "an estimate, the cost of repairs to the dwelling is shared about "equally between the landlord and tenant, I hold the appropriate "factor to be 1⅔ of the gross-value, that is to say, £54, plus £36. "The rent currently applying in the case of this flat, therefore, "will be £90."

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The judge further held that, on the true construction of clause 2 (C) and rule 1 of the schedule to the tenancy agreement, "the tenant is responsible for everything set out in the clause "and the rule, but he may excuse himself if he can show that "the damage in respect of which the landlord is seeking to make "him liable is due to fair wear and tear."

The appeal of the appellants to the Court of Appeal was dismissed.

Neil Lawson Q.C. and *Brian Galpin* for the appellant company. The responsibility of a landlord for repairs is subject to the liability of his tenant at common law for damage which he has caused to the premises. Taking the terms of this agreement, it is submitted: (1) The landlords are responsible for all repairs, excluding internal decorative repairs for which the tenant is made responsible under clause 2 (C) of the tenancy agreement. (2) The tenant's repairing obligation under clause 2 (C), because it is subject to the "fair wear and tear" exemption, is of a minimal character. (3) The tenant has certain repairing obligations under rule 1 of the schedule of rules, but these obligations were qualified (a) by the "fair wear and tear" exception, and (b) by the notice about water taps. (4) Any other obligation of the tenant in respect of the covenant to repair can only be a common law liability and is therefore to be excluded in fixing once and for all the appropriate factor under the Act. The consequence of the "fair wear and tear" exception is to leave nothing but third party damage, act of God or natural calamity.

The "fair wear and tear" exception reduces the tenant's obligation under the repairing covenant to a mere nominal burden on him, and therefore its presence in the covenant to which it is an exception will only affect the determination of the appropriate factor to a nominal extent. The judge erred in crediting the respondent with more than a nominal amount.

Early in the last century there was a group of authorities which appeared to hold that the "fair wear and tear" exception left the tenant in much the same position as if there had been no such provision, but since then a stricter school of thought has prevailed.

Among the cases on a tenant's liability to repair, it is hard to see how *Gutteridge* v. *Munyard*[1] is an authority on "fair "wear and tear" clauses. *Harris* v. *Jones*[2] follows the same lines. *Mantz* v. *Goring*[3] is a case of a "fair wear and tear" exception. The modern authorities returned to the stricter school of thought: see *Davies* v. *Davies*[4]; *Terrell* v. *Murray*[5]; *Lister* v. *Lane and Nesham*[6] (which is not a "fair wear and tear" case); *Citron* v. *Cohen*[7]; *Haskell* v. *Marlow*,[8] and *Taylor* v. *Webb*,[9] which was rightly decided, overruling *Haskell's* case,[10] and gave a wide scope to the exception. See also Woodfall on Landlord and Tenant, 25th ed., p. 765, para. 726. *Taylor* v. *Webb*[11] was universally accepted till *Brown* v. *Davies*,[12] which is distinguishable from the present case because there the tenant covenanted to use the premises "in a fair and tenantable "manner," words which add something to the obligation. The doubts cast on *Taylor* v. *Webb*[13] there were unjustified. In the present case the judge's decision was based on a wrong principle because he did not give *Taylor* v. *Webb*[13] enough weight.

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[1] (1834) 1 Moo. & R. 334, 336; 7 Car. & P. 129, 132.

[2] (1832) 1 Moo. & R. 173.

The effect of the "fair wear and tear" exception here is substantially to relieve the tenant from all liability for want of repair under the terms of the tenancy, except want of repair arising from some natural disaster or from the wrongful act of a third party. Although it leaves the tenant with his common law liabilities to the landlord, these are not to be taken into account in determining the appropriate factor under the Act. In determining that factor the court should disregard the tenant's responsibility for any want of repair for which he would be liable apart from the express terms of the tenancy. At common law, where there is an express repairing covenant in a lease, the tenant nevertheless remains liable for certain defects. As to voluntary waste, see Halsbury's Laws of England, 3rd ed., vol. XXIII, p. 563, para. 1234, *Kinlyside* v. *Thornton*[14] and Woodfall's Landlord and Tenant, 25th ed., p. 802, para. 1790. As to the obligation to use the premises in a tenantlike manner, see *Standen* v. *Chrismas*.[15] The case is referred to in Woodfall's Landlord and Tenant, p. 728, para. 1745. See also *Marsden* v. *Edward Heyes Ltd.*[16] and *Warren* v. *Keen*.[17] These two cases support the proposition that it would not be right to hold that the mere existence of a repairing covenant excepts the tenant from his common law obligation to use the premises in a tenant-like manner; there is still room for the implied obligation. As to the cases when the tenant is guilty of negligence, see Halsbury's Laws of England, vol. XXIII, p. 556, para. 1240. The common law liability, though covered by a covenant, is to be disregarded in the calculation of the appropriate factor because, if one does not disregard it, one is putting a premium on carelessness by the tenant by enabling him to declare that he was a bad tenant, that he would do great damage and that consequently the heavy liability to repair which he would incur must affect the appropriate factor; this would be an anomaly created by the judge's decision. That these matters are not to be taken into account as reducing the rent is also indicated by Part II of Schedule I to the Act, paragraphs 4 (4), 13 and 15, dealing with certificates of disrepair.

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[3] (1838) 4 Bing.N.C. 451, 452.

[4] (1888) 38 Ch.D. 499, 503, 504.

[5] (1901) 17 T.L.R. 570.

[6] [1893] 2 Q.B. 212, 216; 9 T.L.R. 503.

[7] (1920) 36 T.L.R. 560.

[8] [1928] 2 K.B. 45, 47, 48, 51, 53, 58; 44 T.L.R. 171.

[9] [1937] 2 K.B. 283, 295, 298–299, 300–301; 53 T.L.R. 377; [1937] 1 All E.R. 590.

[10] [1928] 2 K.B. 283.

[11] [1937] 2 K.B. 283.

[12] [1958] 1 Q.B. 117, 123, 128, 129–130; [1957] 3 W.L.R. 818; [1957] 3 All E.R. 401.

[13] [1937] 2 K.B. 283.

[14] (1776) 2 Wm.Bl. 1111.

[15] (1847) 10 Q.B. 135, 141.

[16] [1927] 2 K.B. 1.

[17] [1954] 1 Q.B. 15, 20; [1953] 3 W.L.R. 702; [1953] 2 All E.R. 1118.

From section 1 of the Act and paragraph 1 (3) of Schedule I it appears that the legislature intended to create a sliding scale with regard to responsibilities and liabilities to repair, which are distributed between the landlord and the tenant, with a multiplier of two as the ceiling and a multiplier of one-and-a-third as the base. One must look at the express language of the tenancy agreement to see whether it falls within paragraph 1 (3). If it does, one evaluates the quantum by envisaging a tenant who is "reasonably careful," that is, never guilty of negligence by himself or his servants or agents. If there is nothing at all in the tenancy agreement on the subject of repairs, the landlord gets his multiplier of two plus the tenant's common law obligations, and when the multiplier is less than two the common law obligations cannot be brought into calculation.

The judge was wrong in principle in that, in enumerating the matters for which he held the tenant would remain liable despite the "fair wear and tear" clause, he included damage which would fall within its exception.

Brian Galpin following. If it should be held that the tenant's obligations under the tenancy agreement should be taken into account, although there is also a common law obligation, then, in evaluating the amount at which the tenant's covenants are to be put for the purpose of finding the appropriate factor, one must reckon in favour of the landlord that it is not to be assumed that he will proceed under the covenant and not at common law, but that, if he does, the tenant is pro tanto relieved of his common law obligations.

R. E. Megarry Q.C. and *G. Avgherinos* for the respondent. Whereas under the old system the standard rent was permanent, the rent limit is now fixed for the tenancy in question; so this rent is not being fixed once and for all so long as the premises remain under the Act.

The appellants have treated the repairs as being divided between the landlord and the tenant, but the Act looks only to the burden on the tenant. In cases where neither the tenant nor the landlord is put under any contractual obligation, the landlord gets his factor of two. In another case, where the tenant is put under no obligation by covenant but the landlord is under a full repairing covenant, the landlord still gets the factor of two. His obligations are not a factor in the calculation at all. As to the landlord's responsibility for repairs where the tenant is under no express liability, see section 30 (1) of the Housing Repairs and Rents Act, 1954, which does not impose as high a burden as a strict repairing covenant.

There is no distinction between a tenant's liability for repairs at common law and under an express covenant. The only remedy for a breach of a repairing covenant is damages, and a breach of a common law obligation likewise sounds only in damages.

The paragraphs in Schedule I to the Act of 1957 on which the landlords relied appear in Part II, which has nothing to do with fixing the appropriate factor and only deals with abatement for disrepair.

As to the question of "fair wear and tear," Parliament did not intend the court to take the tenancy agreement and evaluate the obligations, a very complicated calculation. Individual tenants may be very different. It is on the obligation that an evaluation must be put. One must assume an average tenant, a human being who is neither an angel nor a devil. In the system of landlord and tenant, actions are brought on covenants and not based on negligence. The "fair wear and tear" exception has been wrongly described as tearing the heart out of the repairing covenant. The appellants attached too wide a meaning to it. In the Oxford English Dictionary, 1933 ed., vol. XII, p. 225, "wear" is defined as "the process or condition of being worn "or gradually reduced in bulk or impaired in quality by continued "use, friction, attrition, exposure to atmospheric or other natural "destructive agencies," and "wear and tear" is defined as "wearing or damage done by ordinary usage; deterioration in the "condition of a thing through constant use or service." There is no distinction between "fair" and "reasonable" in the context of "wear and tear." The phrase is old, but it has no well-settled meaning. It covers the ordinary action of the elements, rain and wind, in causing deterioration. It covers scratches on decorations: see *Scales* v. *Lawrence*.[18] It does not, however, excuse the tenant from consequential damage arising from wear and tear which is not itself fair wear and tear. Thus, although a tenant cannot be required to repair a skylight which has decayed as a matter of fair wear and tear, if he does nothing to keep the weather out (as by putting a board cover over it), he may put himself outside the protection of the fair wear and tear clause. It is to be noted that neglect and negligence are not the same thing. Thus a man may neglect his own country cottage without being negligent, because he is under no obligation to repair it. *Taylor* v. *Webb*,[19] relied on by the appellants, is far too wide. A floor which is worn thin and finally is worn through represents a case of "fair wear and tear," but putting one's foot through the ceiling of the room below would not be "fair wear and tear." *Taylor* v. *Webb* [20] is a special case turning on special facts. It is the only case which stands out of line. Talbot J. was right in what he said in *Haskell* v. *Marlow*,[21] which was wrongly overruled, and that passage should be rehabilitated and preferred to what was said in the later case. The headnote to *Terrell* v. *Murray* [22] is not supported by the body of the report: see *Haskell* v. *Marlow*.[23] That case is so Delphic that it can hardly help the House. *Brown* v. *Davies* [24] is relied on.

It would be extraordinary if the effect of a "fair wear and "tear" clause were as the appellants contend. It would mean that the tenant would be liable for misusing the premises, that he would be liable for damage by extraordinary events like tempest, while he was not liable for damage due to ordinary use or deterioration by weather.

The respondent is content with the order as it stands, but if the matter is to go back to the judge, then it is contended that he has not allowed enough in dealing with the "fair wear and tear" exception. The clause is only a small exception and leaves the tenant liable for rather a lot. The judge should be directed to assess the appropriate factor on the footing that *Taylor* v. *Webb*[25] was wrongly decided and should be disregarded and that regard should be had to what Talbot J. said in *Haskell* v. *Marlow*.[26] If the judge, following *Taylor* v. *Webb*,[27] assessed the appropriate factor, as he must be taken to have done, on the footing that the tenant was relieved from all liability, not only in respect of an original defect, but in respect of all consequential damage, he erred in favour of the appellant landlords.

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[18] (1860) 2 F. & F. 289.
[19] [1937] 2 K.B. 283.
[20] Ibid. 298–299, 306.
[21] [1928] 2 K.B. 45, 58–59.
[22] 17 T.L.R. 570.
[23] [1928] 2 K.B. 45, 55.
[24] [1958] 1 Q.B. 117.

The question of "fair wear and tear" does not enter into rule 1 of the schedule of rules and regulations. The circular as to pipes and taps was ex gratia and did not modify the contract.

Summarised, the submissions as to "fair wear and tear" are these: (1) *Taylor* v. *Webb*[27] was wrongly decided and should be overruled or at least very strictly confined to its own particular facts. (2) A covenant to repair, fair wear and tear excepted, is still substantially a repairing covenant with substantial obligations. The exception does not reduce the burden to virtually nothing. (3) The onus is on the tenant to bring himself within the exception. (4) The exception must be applied to each individual occurrence of disrepair as it happens, the question being whether that occurrence is due to fair wear and tear. (5) The question is whether the occurrence was or was not caused by (a) a fair and reasonable user of the premises, or (b) the ordinary operation of the elements.

As to the common law liability, see paragraph 1 (3) of Schedule I to the Rent Act, 1957. The governing words are "under the terms of the tenancy," and in construing the subparagraph one looks simply at those terms, ignoring the common law liability. The reference is to the express terms of the tenancy, written or oral. The appellants' contentions as to the common law liability would involve reading the enactment "under the terms of the tenancy and not otherwise," or reading in "repairs for which the tenant would not otherwise be liable."

A structure may get out of repair in various ways, by wilful damage, by negligence, by a careless act not amounting to negligence or by normal deterioration. But this Act is not looking at the matter from the repairing end; it is concerned with the person who is liable for restoring the premises. There are no cases on negligence as between landlord and tenant. In that relationship the law has left the parties to make their own obligations. Negligence is irrelevant. A person carrying a suitcase may knock a piece out of a wall, and that person may be seven or 17 or 70. The tenant himself is not assumed to be either a paragon of virtue or one who lays about him with a hatchet; he is assumed to be an average person who will sometimes be careless, but his acts are tested, not by negligence, but by the terms of his covenants. Parliament has painted with a broad brush. As to the nature of the tenant's obligations, see *Standen* v. *Chrismas*.[28] There is no reason for not applying its principles today. One should exclude any obligation to use the premises in a tenantlike manner. The liability to be sued in tort for negligence is not one of the terms of the tenancy.

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[25] [1937] 2 K.B. 283.

[26] [1928] 2 K.B. 45.

[27] [1937] 2 K.B. 283.

As to the appellants' suggestion that the result of the respondent's contentions would be to put a premium on negligence, the picture presented is that of a tenant going into the witness-box to reduce his rent by saying what a terribly careless man he is and therefore what a heavy burden of repair is being imposed on him at common law. As to this, see what was said by Pearce L.J. in the Court of Appeal.[29] The common law obligation is not an obligation to repair and so does not overlap the repairing covenant.

On a simple reading of paragraph 1 (2) of Schedule I to the Act " all repairs " means " all repairs," and " the terms of the " tenancy " mean those which have been expressly agreed. The appellants' contentions involve very complicated calculations.

G. Avgherinos following. *Taylor* v. *Webb* [30] had a substantial effect on the way the evidence here was presented and dealt with by the judge. The House should not support that case. The flat in question here is very small with an area of only 310 sq. ft. in a large block of flats. Such a situation required a practical approach, and on the main point the judge's approach cannot be rightly criticised in that respect.

Neil Lawson Q.C. in reply. *Taylor* v. *Webb* [30] and *Brown* v. *Davies* [31] are reconcilable. In *Standen* v. *Chrismas* [32] there was no fair wear and tear exception. *Taylor* v. *Webb*,[33] since it has been decided, has been taken as laying down the correct legal principle, and agreements have since been entered into on that basis. If a pipe burst in the flat and the tenant failed to turn off the stop-cock to his hand, he would be liable for not using the premises in a tenantlike manner or because that was not a fair use of the premises.

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[28] (1847) 10 Q.B. 135, 141.

[29] [1958] 1 Q.B. 346, 358–359; [1958] 2 W.L.R. 356; [1958] 1 All E.R. 510.

[30] [1937] 2 K.B. 283.

[31] [1958] 1 Q.B. 117.

[32] 10 Q.B. 135.

[33] [1937] 2 K.B. 283.

In the determination of the appropriate factor the "terms of "the tenancy" are the express terms. In fixing the multiplier the judge has a complete discretion which is governed by principles. The proper approach is to take the case where the tenant has not undertaken to do any repairs; there the landlord gets a multiplier of two. In determining the difference between two and one and a third it is wrong to take into account the tenant's common law obligations.

The question is to be dealt with simply as follows: (1) One looks at the express terms of the tenancy to see whether the tenant is under a repairing obligation. (2) If the tenant is under an obligation which is less than a full repairing covenant, one must look to see what obligations he is under, assuming that he is reasonably careful so as not to be in breach of his common law or other obligations. (3) One ascertains the total burden in relation to all the premises for which the landlord is responsible, not because he has so covenanted but because Part II of Schedule I to the Act assumes his being under pressure to do the repairs.

One assumes reasonably careful tenants, and few such tenants would, for instance, smash a hand basin a year in a block of flats.

October 21. Further argument was required on the question whether the judge had misdirected himself by not assuming for the purpose of his determination a tenant who was reasonably careful in his user of the premises let to him.

Neil Lawson Q.C. for the appellants. This is not really a new point and therefore the House has jurisdiction to hear it. It is a different way of putting an old point. The substratum of the argument is still the same.

One can only assume a hypothetical tenant who is a reasonably careful tenant and therefore not in breach of his common law duty. This is not a case in which additional evidence could have been usefully tendered by either party, and it is obviously a point which it is in the public interest should be determined. The Act gives no guidance and there is no authority on the matter.

The basic submission is that the judge was wrong in principle in having regard to repairs for which the respondent would be responsible at common law had there been no repairing covenant in his tenancy agreement. No regard is to be had to liabilities arising from the obligation on the tenant to use the premises in a fair and tenantlike way. Negligence is excluded because one assumes a tenant who is not negligent. It is clear that the judge treated all the cases he mentioned as cases in which the tenant was in breach of some duty.

If the appellants' argument on the common law point is right, then all damage must be excluded which is due (a) to failure on the part of the tenant, his servants or agents, to take reasonable care of the premises; (b) to unfair or untenantlike user on the part of the tenant, his servants or agents, and (c) to voluntary waste committed by the tenant, his servants or agents, or to breaches of covenant on the part of the tenant, his servants or agents, other than breaches of repairing covenants.

The tenant is under an obligation to use reasonable care to prevent his family or guests from doing damage to the premises. Whenever the relationship of master and servant or principal and agent exists between the tenant and a person whom he has brought or allowed to come on to the premises, the ordinary principles of vicarious liability apply.

If a tenancy agreement was silent on the matter of repairs, the fact that the tenant would be liable to the landlord if he was negligent does not affect the consideration of the appropriate factor. The case should not be remitted to the judge except on this basis.

R. E. Megarry Q.C. for the respondent. It is not objected that this point should be raised before the House.

The reasonably careful tenant was not brought to the mind of the judge and his characteristics have not hitherto been discussed. If the House deals with the matter on this basis it should be remitted to the judge with the guidance of the House on this point. If the House is against the respondent the only proper course is to remit the case.

One must ask oneself whether the "reasonably careful" tenant is the average tenant or the reasonable tenant. "Reasonably careful" does not mean "invariably careful." All tenants will at some time commit an act of carelessness or negligence. A reasonably careful person, a driver, for instance, is careful most of the time: see *A. C. Billings & Sons Ltd.* v. *Riden.*[34] That applies to the reasonably careful tenant.

As tenants of these small premises one would visualise a man or woman or a married couple, but children might come to visit them occasionally and these would have the usual propensities of children. The tenant may have well-conducted parties, but a guest may occasionally be careless with a cigarette. A taxi-driver helping the tenant with a trunk may do damage to a wall which goes beyond mere decorative damage. The tenant cannot guarantee that damage caused by the children, the party guest or the taxi-driver will not be more than decorative damage.

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[34] [1958] A.C. 240, 255; [1957] 3 W.L.R. 496; [1957] 3 All E.R. 1.

In making his calculation the judge must assume a hypothetical tenant in the person of an average tenant, a reasonably careful tenant who is not habitually negligent. It makes very little difference whether one speaks of negligence or carelessness. One must not assume a paragon of virtue who is always careful, one who is never guilty of occasional acts of carelessness.

As to the principles applicable in dealing with the judgment of the court below, see *Stepney Borough Council* v. *Joffe.*[35]

Neil Lawson Q.C. in reply. The tenant cannot take advantage of his own breach of his common law duty, no matter how it is expressed, simply because he has a repairing covenant as well as an obligation to pay damages.

Taking the ordinary reasonable tenant as one's standard, there is no difference between negligence and carelessness. One assumes that a reasonably careful tenant will not be negligent, even once in five years.

The clue to the difficulty here is that there has been confusion in the judge's mind between the positive obligation to carry out repairs and a user of the premises which may give rise to a claim for damages. These should be distinguished. The difficulty is avoided if in making the assessment one ignores all damage due to negligence.

Their Lordships took time for consideration.

November 6. VISCOUNT SIMONDS. My Lords, the respondent is the tenant of certain premises known as Flat 248, Chelsea Cloisters, in the county of London. His landlords are the appellant company, Regis Property Co. Ltd. These premises are, by reason of their low net rateable value, subject to rent control under the provisions of the Rent Act, 1957. That Act, however, provides that a landlord may, upon giving the appropriate notice, alter the method of calculating the rent of controlled dwelling-houses from the former basis of a standard rent plus permitted increases to a new basis which, so far as is relevant to the present appeal, is to be fixed by multiplying the gross rateable value of the premises by what is called "the "appropriate factor."

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[35] [1949] 1 K.B. 599, 603; 65 T.L.R. 176; [1949] 1 All E.R. 256.

Taking advantage of this provision, on July 22, 1957, the appellant company applied to the West London County Court for an order determining the appropriate factor by which the gross value of the premises should be multiplied for the purpose of ascertaining the rent limit applicable thereto, and served due notice of the application on the respondent. Other matters also were brought before the court, but with these your Lordships are not concerned.

On August 29, 1957, the learned county court judge made an order determining that the appropriate factor for the relevant purpose was five-thirds. An appeal from his order was dismissed by the Court of Appeal. Your Lordships are now asked to set these orders aside and to remit the application to the county court for the redetermination of the appropriate factor in accordance with what appear to your Lordships to be the correct principles upon which it should be determined. I emphasise that your Lordships can take this step only if the learned judge and the Court of Appeal acted upon some wrong principle.

It is convenient that I should now state in greater detail first the relevant provisions of the 1957 Act and then the tenancy agreement between the parties.

Section 1 (1) of the Act provides that: "Subject to the "following provisions of this Act the rent recoverable for any "rental period from the tenant under a controlled tenancy shall "not exceed . . . a rent of which the annual rate is equal to the "1956 gross value of the dwelling multiplied by two (or, if the "responsibility for repairs is such as is specified in Part I of the "First Schedule to this Act, by the appropriate factor specified in "the said Part I)," together with annual amounts in respect of rates and service with which this appeal is not concerned. As I have already indicated, "appropriate factor" means the number by which the gross value is to be multiplied in determining the rent limit.

The relevant provisions of Part I of Schedule I may be set out verbatim. They are as follows: "1.—(1) The following "provisions shall have effect in ascertaining the rent limit by "reference to the 1956 gross value. (2) If under the terms "of the tenancy the tenant is responsible for all repairs, the "appropriate factor shall be four-thirds. (3) If under the terms "of the tenancy the tenant is responsible for some, but not all, "repairs, the appropriate factor shall be such number less than "two but greater than four-thirds as may be agreed in writing "between the landlord and the tenant or determined by the "county court."

It is plain that it is only Part I of the Schedule which has any bearing upon the determination of the appropriate factor, but the appellants referred to and relied upon Part II and I therefore myself refer to it. It is concerned with the obtaining of a so-called certificate of disrepair which, while it is in force, prevents the landlords from getting the increase of rent which they might otherwise get under Part I. It is headed "Abatement for disrepair" and contains elaborate provisions for the service by a tenant of a notice of disrepair of the premises by reason of defects stated in the notice, for the landlords' undertaking to repair the defects, for the issue by the local authority to the tenant of a "certificate of disrepair," and for the cancellation in certain circumstances of such certificate, and so on. Specifically it provides, by paragraph 7 (2), that: "Where a "certificate of disrepair is issued, then as respects any rental "period beginning while the certificate is in force the appropriate factor shall be four-thirds." Reliance was also placed on paragraph 15, which provides that references in that Part (i.e. Part II) of the Schedule "to defects for which the tenant "is responsible are references to defects for the remedying of "which, as between the landlord and the tenant, the tenant is "responsible, or defects which are due to any act, neglect or "default of the tenant or any person claiming under him or "any breach by the tenant or such a person of any express "agreement." These provisions may give rise to difficulties of their own, but I am at a loss to know what light they can throw upon the meaning of the provisions of Part I.

The tenant's obligations in respect of repair are contained in clause 2 (C), (D), (E) and (F) of the agreement and are as follows: [His Lordship read clause 2 (C), (D), (E) and (F) and paragraph 1 of the schedule of rules and regulations and continued:] This provision is clearly out of place. It is an important obligation of repair and I should have expected it to follow clause 2 (C) in the body of the agreement. It will be seen that some difficulty has been caused by this fact.

The only other fact which need be noticed is that the appellants' agents circularised the tenants to the effect that where taps required washering or reseating they were particularly requested to report it to the porter's lodge, when the landlords would be pleased to effect repairs without charge to the tenant. I do not think that this offer, which could at any moment be recalled, can affect the appropriate factor.

When the application came before the county court judge evidence was given by an expert witness on each side and it was natural that their opinions should widely differ as to the burden in terms of pounds, shillings and pence falling upon the tenant under the terms of the agreement. It was a noteworthy fact that the landlords' witness was for reducing the tenant's liability, the tenant's for enlarging it. The learned judge did not wholly accept the evidence of either of them and held that the landlords' liability for repairs should be valued at £7 5s. per annum and the tenant's at £7 7s. He therefore assessed the appropriate factor at five-thirds. I do not think that in coming to this conclusion the learned judge preferred the principles adopted by one witness to those adopted by the other: I doubt whether there was in this respect any difference between them. The difference was in quantum—a matter of fact upon which the decision cannot be questioned unless the judge erred in principle.

I ask, then, what was the error in principle? It appears that in the county court and in the Court of Appeal two main questions and a subsidiary question were argued. The first main question is succinctly stated in the first and second reasons in the appellants' formal case. They are (1) that "the learned "county court judge erred in principle in having regard to repairs "for which the respondent would be responsible at common law "had there been no repairing covenant in his tenancy agree-"ment" and (2) (which is consequential) that he "erred in "principle in evaluating those liabilities, in that he credited the "respondent with the full value thereof."

As I understand the argument for the appellants, it is that, if some repair is necessary to the premises and if that repair is made necessary by some act of the tenant for which he could be held liable at common law, then, notwithstanding that he is also liable to repair under the terms of his tenancy, it is a repair for which he is not to be regarded as responsible for the purpose of determining the appropriate factor under Part I of the Schedule to the Act. This argument was rejected, and, in my opinion, rightly rejected, in the county court and the Court of Appeal. The court is concerned only with the tenant's responsibility for repairs under the terms of the tenancy. It is irrelevant why those repairs have become necessary. I am ignoring for the moment the "fair wear and tear" clause which demands separate consideration. Nothing could be plainer than the language of Part I: "If under the terms of the tenancy the "tenant is responsible for *all* repairs": "If under the terms "of the tenancy the tenant is responsible for some, but not all, "repairs." I see no reason why "all" should mean anything less than all, why there should be excluded from "all" repairs those repairs (if there be any) which the tenant can be called upon to execute by invoking the doctrine of permissive waste or any implied obligation on his part arising at common law out of the relation of landlord and tenant or even, as was suggested, by reason of his negligence. Not only is there no possible reason for any such interpolation: it would as a practical matter be a difficult, if not an impossible, task to fix the tenant with any such liability. I do not recall any case—I do not, my Lords, believe that there is any case in the books—in which a court of law has been asked to do gross violence to the plain language of a statute upon such an inadequate pretext. The language is plain: no words could more plainly express a simple concept. The violence is gross: an indefinite "some" is substituted for "all." The pretext is inadequate and worse. For it is in itself nothing else than the assertion that in this difficult area of the relation of landlord and tenant the court knows better than Parliament what changes should be made in the existing legislation and will adjust and alter the language of a statute accordingly. I reject with such emphasis as I can command any such suggestion. I am content to adopt the view expressed by Pearce L.J., delivering the unanimous judgment of the Court of Appeal,[1] that "such repairs are in fact a responsibility under "the express terms of the agreement. The fact that there may "be a concurrent liability at common law does not alter that "fact." He added, and I agree, that "if one applies the test "of common-sense and practice, one can hardly imagine a "landlord claiming against a tenant in respect of them other "than under the express covenant." This challenge to the judgment of the county court judge, which primarily, if not solely, turns on the true construction of the statute, therefore fails.

It is convenient at this stage to notice an argument which was directed to the alleged anomalous result of the decision. It was said to put a premium on a tenant's negligent conduct enabling him to proclaim how bad a tenant he was and would be, what damage he would do and how heavy would be his liability to repair and therefore to demand that the appropriate factor should be as low as possible. My Lords, I do not doubt that such complicated legislation as the Rent Act has led and will lead to some anomalies. But I am not moved by this suggested anomaly. The court is not concerned with the character or proclivities of the particular tenant. Rightly, no evidence was given in regard to those of the present respondent. The court is concerned only with the premises and the relevant repairing obligations of the tenant.

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[1] [1958] 1 Q.B. 346, 358–359; [1958] 2 W.L.R. 356; [1958] 1 All E.R. 510.

At this stage I must diverge from the argument as presented to the Court of Appeal and in the formal case of the appellants in this House. The assumption being made that upon the true construction of the Act the county court judge did not err in principle in having regard to repairs for which the respondent might be responsible at common law had there been no repairing covenant in his tenancy agreement, it appeared to their Lordships that the question was still unresolved what weight should be given to this element in a tenant's obligations in determining the appropriate factor. They, therefore, required further argument from counsel and posed to them the question whether upon the assumption already stated the learned judge had misdirected himself by not assuming, for the purpose of his determination, a tenant who was reasonably careful in his user of the premises let to him. It appeared, however, at once that there was some ambiguity in this question. Learned counsel for the appellants, Mr. Lawson, adhering to the view that damage due to negligence (as I will call it for short) must be altogether excluded, was, of course, ready to accept the standard of a hypothetical tenant who was reasonably careful if that meant a tenant who, being reasonably careful, never caused damage by carelessness. A number of difficult questions would admittedly arise in respect of damage caused by the tenant's family or guests or licensees or trespassers. But, broadly speaking, the result was precisely the same as it would be if no assumption had been made and damage due to negligence and a consequent obligation to repair were outside the relevant computation. And to reinforce this view he made it quite clear that he did not ask your Lordships to remit the case to the county court for further consideration except upon that basis.

The attitude of learned counsel for the respondent, Mr. Megarry, was very different. He agreed—he could not do otherwise—that it is necessary to assume some kind of tenant since the rent is to be paid by a tenant. What sort of tenant, then, is this hypothetical tenant to be? For Mr. Megarry, as for Mr. Lawson, the essential question was whether damages for negligence should be excluded, and it appeared to me that, as long as this question was answered in the negative, he did not mind whether the hypothetical tenant was described as an average tenant or a reasonably careful tenant or by any other description. He was in fact satisfied with the way in which the matter had been dealt with by the county court judge, who declined to assume a tenant who in his own words "can be "relied on always to be careful."

Upon this question there was much discussion. It was clearly a very difficult matter to define the hypothetical tenant with any sort of precision. It is desirable that more definition should not be attempted than the occasion needs and therefore, though I had myself attempted that task, I shall say no more than that, having read the opinion which my noble and learned friend, Lord Tucker, will shortly deliver, I find myself fully in agreement with every word of it and respectfully adopt it.

I turn to the second main question argued in the courts below and again I look at the appellants' third and fourth reasons in their formal case. They are (1) that the county court judge "erred in principle in crediting the respondent with more than a "nominal amount in respect of his liability to repair in view of "the 'fair wear and tear exception' contained in the tenancy "agreement," and (2) that "*Taylor* v. *Webb*[2] was rightly "decided." This latter reason must remain, for the moment, enigmatical. I will return to it.

The purport of his argument is that the qualification of the repairing covenant in clause 2 (C) by the fair wear and tear clause reduces the value of the tenant's obligation to a small or even negligible amount, that this is the effect of the decision in *Taylor* v. *Webb*[2] and that the learned judge did not pay sufficient regard to it. I must interpose that counsel for the respondent, the tenant, while content with the order as it stands, asks that if the matter is remitted to the county court, there should be a direction to the judge to assess the appropriate factor upon the footing that *Taylor* v. *Webb*[2] was wrongly, not rightly, decided. He claimed that too much weight had been given to that decision and that upon a true view of the clause the tenant's obligation under the covenant, though qualified, was greater than the judge allowed. It is, I think, a fair criticism of the judgment of the learned judge that it is not easy to see just how, as a matter of principle, he did regard the impact of the fair wear and tear clause nor how he translated into figures the qualification which it imposed on the covenant.

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[2] [1937] 2 K.B. 283; 53 T.L.R. 377; [1937] 1 All E.R. 590.

My Lords, I must now refer to *Taylor* v. *Webb*,[2] which has loomed large in this case, though I doubt whether it has great practical importance. There is, I think, no doubt that the decision in that case has been regarded as making a substantial change in the law. It may be that in the peculiar circumstances of the case the decision was correct. I do not have to decide that. But I entertain no doubt that the statements of principle made by the court (Slesser L.J., Scott L.J. and Farwell J.), if they are applied (as I think they were intended to apply) to the common case of a qualified repairing covenant, cannot be supported. I say " intended to apply " because the court expressly overruled the decision of a Divisional Court in *Haskell* v. *Marlow*[3] in which the court had, in what I have called the common case, given a narrower meaning and effect to such a covenant. In the latter case Talbot J., whose judgment I prefer to that of Salter J., said of such a covenant[4]: " The meaning is that the tenant (for life " or years) is bound to keep the house in good repair and condition, " but is not liable for what is due to reasonable wear and tear. " That is to say, his obligation to keep in good repair is subject " to that exception. If any want of repair is alleged and proved " in fact, it lies on the tenant to show that it comes within the " exception. Reasonable wear and tear means the reasonable use " of the house by the tenant and the ordinary operation of natural " forces. The exception of want of repair due to wear and tear " must be construed as limited to what is directly due to wear " and tear, reasonable conduct on the part of the tenant being " assumed. It does not mean that if there is a defect originally " proceeding from reasonable wear and tear the tenant is released " from his obligation to keep in good repair and condition every- " thing which it may be possible to trace ultimately to that defect. " He is bound to do such repairs as may be required to prevent " the consequences flowing originally from wear and tear from " producing others which wear and tear would not directly

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[2] [1937] 2 K.B. 283; 53 T.L.R. 377; [1937] 1 All E.R. 590.

[3] [1928] 2 K.B. 45; 44 T.L.R. 171.

[4] [1928] 2 K.B. 45, 58–59.

"produce." The learned judge then quotes as an example the case of a tile falling off a roof and the consequential damage.

My Lords, I have quoted this passage at length because it states better than I could state it what I believe was always regarded as the law on this matter until *Taylor* v. *Webb*[5] was decided and should now be reinstated as the law by your Lordships' decision. In that case each of the three judges directly disapproved of the reasoning of Talbot J. in *Haskell* v. *Marlow*[6] and in effect held that the clause relieved the tenant, not only from the immediate effects of wear and tear, but from the obligation to take any steps to avert any consequential damage. I think that the learned editor of the 25th edition of Woodfall on Landlord and Tenant was well justified in saying at p. 766: "It is open to question "whether this case [sc. *Taylor* v. *Webb*[7]] does not go too far as "a statement of principle and should be regarded perhaps as a "decision on the particular facts; the principle quoted from "Tindal C.J. seems to accord better with what draftsmen "intend." The quotation to which he refers is the well-known passage from *Gutteridge* v. *Munyard*.[8] The guarded observations of the Court of Appeal in *Brown* v. *Davies*[9] point in the same direction.

My Lords, can it, then, be said that in the present case the judge was wrong in principle in the force which he gave to the clause? He had before him the then binding decision in *Taylor* v. *Webb*[10]: he said that he must consider in due course the application of that decision to the circumstances of the case and, though, as I have said, it is not clear at least quantitatively how he applied it, I can see no ground for saying that in any sense adverse to the appellants his decision was based on any wrong principle. On the contrary, I can well understand the claim of the respondent that, if the learned judge, following *Taylor* v. *Webb*,[10] made his assessment on the footing that the tenant was relieved from all liability, not only in respect of an original defect, but also from all consequential damage, then he erred in principle in favour of the appellants. Therefore the second main ground of challenge fails.

But, my Lords, there is another aspect of this clause which has caused me much difficulty. It is closely linked with what I have called a subsidiary question which arises upon the first rule or regulation in the schedule. That has already been set out. The question was whether the fair wear and tear clause applied to the rule as well as to clause 2 (C) of the tenancy agreement in which it is to be found. The learned judge held that it did. The Court of Appeal held that it could not be read into rule 1 without qualification as it seemed inappropriate to the obligations in regard to various specific matters imposed by the rule. With this I agree. It would, for instance, be absurd to qualify damage caused " through improper use or negligence " by a fair wear and tear clause. On the other hand (agreeing again with the Court of Appeal), I see no reason why, reading the rule with clause 2 (C) as I must, since that clause specifically refers to " sanitary " and water apparatus," the fair wear and tear clause should not be applied to those matters to which it can properly be applied, i.e., to the opening words down to the words " proper repair and " order." And this, I think, is all that the learned judge in effect has done.

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[5] [1937] 2 K.B. 283.

[6] [1928] 2 K.B. 45.

[7] [1937] 2 K.B. 283.

[8] (1834) 1 Moo. & R. 334.

[9] [1958] 1 Q.B. 117, 126–127; [1957] 3 W.L.R. 818; [1957] 3 All E.R. 401.

[10] [1937] 2 K.B. 283.

Finally, it has been said that the learned judge has erred in principle because in his enumeration of the items for which the tenant will remain liable notwithstanding the fair wear and tear clause, he has included damage which falls within the exception provided by that clause. My Lords, it is obvious that it may be open to debate, whether any particular damage necessitating repair when it has occurred has been due to fair wear and tear or not. Still more is it open to debate whether when it occurs in the future it will be due to fair wear and tear. I should not myself say that it is impossible or even unlikely that some of the events enumerated might not be so due. But I do not think it is possible to say that the learned judge erred in principle in his enumeration and I think, therefore, that on this ground too the appeal fails. In the result the appeal should, in my opinion, be dismissed, with costs.

Lord Morton of Henryton. My Lords, the most important question arising on this appeal relates to the method to be adopted in ascertaining the " appropriate factor " specified in Part I of Schedule I to the Rent Act, 1957, in a case where, under the terms of the tenancy, the tenant is responsible for some, but not all, repairs. A minor question arises as to the true construction of the tenancy agreement made between the appellants as landlords and the respondent as tenant. The relevant facts are as follows: [His Lordship stated the facts and continued:]

My Lords, it was common ground between the parties that the learned judge was right in the course which he pursued of estimating the sums which each party would have to spend per annum on repairs, under the terms of the tenancy, and fixing the appropriate factor on this basis; and I add that the words "under the terms of the tenancy" in Part I of Schedule I must, in my view, apply equally to an oral and a written tenancy agreement. The court must first ascertain what obligations as to repair are placed upon the tenant under the terms of the tenancy and then estimate the annual cost of carrying out these terms. It is also common ground that on the figures at which the learned judge arrived he was right in fixing the appropriate factor at $1\frac{2}{3}$ of the gross value, that figure being, of course, exactly halfway between the maximum of 2 and the minimum of $1\frac{1}{3}$. It was, however, contended on behalf of the appellants that the learned county court judge fell into an important error of principle in assessing the tenant's liability for repairs under the terms of the tenancy at "not less than £7 7s. per annum," because he took into account repairs rendered necessary by conduct of the tenant which would be a breach of his obligations at common law.

My Lords, I would reject this contention, for the reasons given by Pearce L.J. in delivering the judgment of the Court of Appeal, but I have felt considerable doubt as to whether the learned judge did not go wrong in a different way. It is clear that the amount which any tenant will have to spend on repairs in a year, under the terms of his tenancy, depends in part upon how far the terms of his tenancy make him liable for repairs, in part upon the nature of the property let, and in part upon the behaviour of the tenant. Thus, in estimating this sum, the court must assume a tenant of a particular type. This was recognised and accepted by counsel for appellants and respondent when the appeal was further argued on October 21, 1958. It was not suggested by either side that the court should investigate the personal qualities of the person who is in fact the tenant at the time when the estimate has to be made.

My Lords, in my opinion the type of tenant who should be assumed for the purposes of the calculation now under consideration is a tenant who is reasonably careful in his user of the premises. I can see no good reason why the legislature should have had any other type of tenant in mind when it placed upon the court the task of determining the "appropriate factor"; a task which must obviously involve estimating the burden of the repairs for which the landlord and the tenant respectively are "responsible under the terms of the tenancy." It would surely be wrong for the court, in estimating the burden on the tenant under these terms, to do so upon the footing that the tenant will make that burden heavier by reckless behaviour or wanton destruction.

I recognise, however, that even the reasonably careful tenant may have moments when he acts in a negligent way, and damage may be done by negligent acts of his wife (if any), children (if any), servants and agents. I think that a county court judge is justified in making some allowance for the possibility of such events happening. In my opinion, however, the learned judge in the present case has taken too gloomy a view of the conduct to be attributed to the hypothetical tenant, and the " sort of " things which are likely to happen " in this little two-roomed flat, as set out in the list of items, which I have quoted from his judgment.

For this reason, I was at one time disposed to think that the present case should be remitted to the county court for reconsideration of the figure of £7 7s.; but when this appeal was further argued on October 21 I found that counsel for the appellants did not wish to ask for such an order unless your Lordships were of opinion that every repair rendered necessary by negligence should be excluded from the calculation. This would involve imagining a tenant who is never at any time negligent during the whole course of his tenancy, and attributing a similar perfection of behaviour to his spouse (if any), children (if any) and servants or agents. I cannot find in the Act any justification for this.

I now turn to an argument submitted by counsel for the respondent. In the course of his judgment the learned judge said: " My attention has been drawn to the case of *Taylor* v. " *Webb*,[11] but it must be remembered that the damage under " consideration in that case was due to the state of the outside " of a house exposed to the elements." Later he observed: " It is the application of this decision to the circumstances of the " present case that I shall have to consider in due course." In fact the learned judge did not refer again to *Taylor* v. *Webb*,[11] but counsel for the respondent contended (1) that he must be taken to have applied the principles laid down in *Taylor* v. *Webb* [11] in arriving at the figure to be ascribed to the " fair wear " and tear " exception in clause 2 (C) of the tenancy agreement; (2) that *Taylor* v. *Webb* [11] wrongly overruled *Haskell* v. *Marlow* [12];

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[11] [1937] 2 K.B. 283.

[12] [1928] 2 K.B. 45.

(3) that the view expressed by Talbot J. in *Haskell* v. *Marlow* [13] as to the effect of a "fair wear and tear" exception is to be preferred to the views expressed by the members of the Court of Appeal on the same topic in *Taylor* v. *Webb*.[14] Accordingly, counsel for the respondent submitted that if for any reason the case is referred back to the learned judge—though they were quite willing to accept his findings as they stood—he should be directed to reconsider the figure to be ascribed to the "fair wear and tear" exception in the present case in accordance with the view of Talbot J. just mentioned.

I understand that your Lordships are all inclined, as I am, to accept the contentions just stated. I think, however, that in a case such as this, where the obligations of the tenant relate solely to the interior of the premises, where no question of interior decoration arises, and where "the premises" are a small modern flat, it can hardly make any difference to the practical result whether the judge applies the view of Talbot J. in *Haskell* v. *Marlow* [15] or the view of the Court of Appeal in *Taylor* v. *Webb*,[16] and I am not surprised that counsel for the respondent are willing to accept his findings.

Two further questions were considered in the course of the argument. First, did the "fair wear and tear" exception in clause 2 (C) of the tenancy agreement apply to the obligations imposed on the tenant by clause 2 (E) and rule 1 of the schedule? This exception is not mentioned in either of these two parts of the document, but the obligations in clause 2 (C) include an obligation "to keep the sanitary and water apparatus" of the flat "in "good and substantial repair and condition," with a "fair wear "and tear" exception. This being so, I think that the same exception must apply to the opening words of rule 1, down to "proper repair and order," since these words deal, in substance, with the same subject-matter. I do not think that this view is in conflict with the views expressed in the county court and the Court of Appeal. Even if the learned judge intended to apply the exception to the whole of rule 1, I do not think it likely that this error affected in any way the figure of £7 7s. already mentioned.

The second question related to the effect (if any) of the circular letter, already set out, upon the obligations of the tenant as to repairs. Counsel on both sides agreed, however, that if your Lordships took the view with which I have just expressed my agreement, the duty as to washering or reseating taps would be a "repair" to which the "fair wear and tear" exception applied.

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[13] [1928] 2 K.B. 45, 58, 59.

[14] [1937] 2 K.B. 283.

[15] [1928] 2 K.B. 45.

[16] [1937] 2 K.B. 283.

For these reasons, my Lords, I would dismiss the appeal.

LORD TUCKER. My Lords, the main question in issue in this case in the Court of Appeal and as originally presented to your Lordships by counsel for the appellant company was whether the learned county court judge had correctly construed the words "if "under the terms of the tenancy the tenant is responsible for "some, but not all, repairs" in paragraph 1 (3) in Part 1 of Schedule I to the Rent Act, 1957, for the purpose of fixing "the "appropriate factor" with a view to determining the rent limit of the flat in question.

The contention was that the learned judge erred in including in the repairs for which the tenant was responsible under his tenancy agreement those repairs for which he would have been responsible at common law apart from and irrespective of his express obligations under his agreement.

This raised a pure question of law of wide importance and eminently suitable for determination by the Court of Appeal. It was rejected—and, in my opinion, rightly rejected—by that court in the following words [17]:

"The question is whether in law he could properly throw those "occurrences into the tenant's scale as matters for which the "tenant was responsible under the terms of the agreement. They "were in fact matters for which he was so responsible. Mr. "Lawson argues that the tenant's liability for them at common "law makes it incorrect to describe them as a responsibility "under the terms of the agreement. We cannot accept that "argument. Such repairs are in fact a responsibility under the "express terms of the agreement. The fact that there may be "a concurrent liability at common law does not alter that fact. "If one applies the test of common sense and practice, one can "hardly imagine a landlord claiming against a tenant in respect "of them other than under the express covenant."

My Lords, I start by asking myself what, apart from actions for waste, are the common law remedies of a landlord against a tenant for damage resulting from the negligent use of the demised premises by the tenant. Neither counsel was able to cite any case in which any such action had ever been brought. Negligence involves a breach of duty and I should have supposed that the measure of that duty arising out of the relationship of landlord and tenant was to be found in the express terms of the contract between the parties or in the covenants which the law over the years has implied from that relationship in certain types of tenancy, e.g., the letting of furnished premises, weekly tenancies and yearly tenancies. However this may be, I will assume for present purposes that some such action would lie at common law either concurrently with the remedy for breach of contract or in lieu thereof where there is no express contract. In such an action the tenant clearly would not be responsible for the negligent acts of his children or his guests, and for damage so caused the landlord would have to rely on his contractual rights. What should the county court judge have done with regard to repairs due to such causes? Should he have excluded them, together with those which were due to the negligence of the tenant or his servants, or should he have made a separate calculation with regard to each category and have excluded one and included the other?

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[17] [1958] 1 Q.B. 346, 358–359.

My Lords, such problems do not, in my view, arise out of the language of the Schedule. The words " repairs for which the " tenant is responsible " must have the same meaning in paragraph 1 (2) and paragraph 1 (3); it is only the quantum that differs. I can find no justification for giving the words " all repairs " any meaning other than their natural and ordinary meaning of all repairs whatever the cause of the disrepair and regardless of any concurrent remedies available to the landlord for the enforcement of the tenant's obligations. The only justification, as I understood the argument, for giving a limited meaning to the words was said to be found in the language of Part 2 of the Schedule and in particular to paragraph 15 thereof which provides that references in that Part of the Schedule " to defects for which the " tenant is responsible are references to defects for the remedying " of which, as between the landlord and the tenant, the tenant " is responsible, or defects which are due to any act, neglect or " default of the tenant or any person claiming under him or any " breach by the tenant or such a person of any express agree-" ment." The precise effect of these words may require consideration on some future occasion when the cancellation of a certificate of disrepair is in question, but I do not think they can justifiably be called in aid in order to qualify the plain language of a different Part of the Schedule dealing with a different subject-matter, viz., the ascertainment of the appropriate factor as distinct from the procedure laid down in Part 2 for the abatement of disrepair and the grant and cancellation of certificates of disrepair.

My Lords, I agree with the Court of Appeal in thinking that this contention of the appellant company was rightly rejected by the county court judge.

At a late stage of the hearing counsel for the appellant company advanced an alternative argument leading to the same result by a different process which does not involve doing violence to what I regard as the clear language of the Schedule. He said that you look at the express language of the tenancy agreement to ascertain whether it falls within paragraph 1 (3) of the Schedule and if it does you then proceed to evaluate the quantum. This entails envisaging a hypothetical tenant and in the present context such a tenant is one who throughout his tenancy is never guilty of negligence in relation to his user of the premises and whose servants or agents are equally blameless. This tenant he described as "a reasonably careful tenant." Mr. Megarry for the respondent, whilst disposed to accept the description of the hypothetical tenant as "reasonably careful," submitted that such a tenant would from time to time be liable to fall below the standard of perfection required from Mr. Lawson's hypothetical tenant and consequently a certain degree of negligence on his part or on the part of those for whom he is responsible is to be expected.

My Lords, as counsel on each side by adopting the same words of description arrive at such different results, it makes me doubt whether the words "a reasonably careful tenant" are very apt to describe this hypothetical person. However, as I understand some of your Lordships are of opinion that this is the proper test, I would not quarrel with this description, provided it is made clear that Mr. Megarry's interpretation is the right one and that perfection is not to be attributed to this hypothetical tenant who is, I think, to be taken to be of the type who may reasonably be expected to occupy identified premises in a particular locality on the terms of the agreement in question. I can find nothing in the judgment of the learned county court judge which leads me to doubt that this is the test which he applied. There is, in my opinion, no justification for inferring that he intended to attribute to the tenant all the acts enumerated by him towards the end of his judgment. They are merely examples of the kind of things some of which might be expected to occur during the tenancy and for which, if they did occur, the tenant would be responsible. I think the figure of £7 7s. 0d. at which he fixed the tenant's total liability makes this quite clear. Furthermore, the passage in his judgment at p. 8 of the Record where he says: "I must, therefore, regard the agreement as one "that repudiates specifically the assumption that tenants can be "relied upon always to be careful. It assumes instead that there "may be some who are not," although founded upon the language of the particular agreement, clearly indicates the type of hypothetical tenant envisaged by him.

It is said that unless you exclude repairs due to negligence it follows that the greater the degree of negligence attributed to the hypothetical tenant the lower will be his rent. If this is illogical it is the fault of the statute and is no justification for reading into the Act words which are not there or endeavouring to reach the same result by assuming a perfect tenant and concealing his perfection by describing him as "reasonably careful." Surely there can be no justification for assuming that the conduct of the tenant will be either extremely good or extremely bad and it would seem to be equally illogical that the better his anticipated conduct the higher will be his rent. To me the conclusion seems irresistible that the hypothetical tenant must be the ordinary average man with all his imperfections and liability occasionally to fail to maintain that standard of care which the law requires of him in his relation to his neighbours.

With regard to the application of the fair wear and tear exceptions, I agree that the judgment of Talbot J. in *Haskell* v. *Marlow*[18] is to be preferred to the judgments of the Court of Appeal in *Taylor* v. *Webb*[19] in so far as questions of principle are involved and that to this extent the latter case should be regarded as overruled. I find it difficult, however, to ascertain in what way the application of the decision in *Taylor* v. *Webb*[19] affected the computation made by the learned judge, and I agree that if he erred at all it was probably in favour of the appellants.

My Lords, with regard to the question of the application of the fair wear and tear exception to paragraph 1 of the schedule to the tenancy agreement, and to the criticism directed to the inclusion of some of the specific items enumerated by the county court judge, I am in agreement with the views which have been expressed by my noble and learned friend on the Woolsack and have nothing to add thereto.

For these reasons I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, this appeal falls to be decided, in my opinion, on a very short point. The question is how the county court judge is to determine the basic rent of the demised premises, having regard to the terms of the tenancy agreement. This is not a matter on which absolute precision is possible in the intermediate class of case where the tenant is liable for some, but not all, repairs as here. At opposite ends of the scale no difficulty arises. If the tenant is liable for no repairs the "appropriate factor" is two (section 1 of the Act). If the tenant is liable for all repairs the "appropriate factor" is four-thirds (paragraph 1 (2) of Schedule I). In the intermediate class the "appropriate factor" has to be determined by the county court and if the judge proceeds on proper principle his figure can hardly be challenged.

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[18] [1928] 2 K.B. 49.

[19] [1937] 2 K.B. 283.

In the present case the learned county court judge, in the course of his judgment, said this: "There is, however, a further "consideration that I am asked to take into account regarding "repairs arising through negligence, and it is this. It is sub-"mitted that in construing this agreement it should be assumed "that the tenant will be a reasonably careful tenant, that is to "say, not a negligent one, and that the negligence clause can "therefore be disregarded. It might be possible to accept this "argument in the case of an agreement that was silent as to "the tenant's negligence. It might then, I think, be argued "that it should be assumed that when the agreement was drawn "up the landlord had in mind only tenants who would behave "with reasonable care, but this agreement is not silent; it quite "obviously assumes and takes into account the possibility that "the tenant or his servants may be negligent and it formulates "provisions to apply in such a case. I must, therefore, regard "the agreement as one that repudiates specifically the assump-"tion that tenants can be relied upon always to be careful. It "assumes instead that there may be some who are not." From his catalogue in a later part of his judgment of the sort of things that happen it is clear, I think, that to some extent he has applied the view so expressed. In my opinion, he has here misdirected himself.

The question, as I see it, is not what the particular tenant would be responsible for in the event of his negligence. Even if he were under no repairing obligations he would, in my opinion, be liable for disrepair caused by negligent treatment of the demised premises. The question is how is the quantum of repair to be fairly allocated between landlord and tenant in light of the repairing covenants imposed by the tenancy agreement. The terms of the agreement are material as showing the scope of the repairs that may be expected to fall on the landlord and tenant respectively.

There are references in rule 1 of the "Schedule of Rules and "Regulations" to negligence of tenants or their servants. These, I think, refer to negligence in the use of baths and other sanitary fittings and seem intended to cover consequential damage to the demised premises or to other flats. This seems a very natural clause for the protection of the landlord, though it adds, I think, nothing to the liability which would attach to the tenant in any case apart from the clause. The reference to "other flats" would seem also to put it into a special character of stipulation outside the ordinary repairing covenant. But whatever the clause means, it cannot be taken to warrant the assumption that the landlord contemplates a negligent tenant or is granting to the tenant a charter to be negligent.

It was accepted as common ground and, in my opinion, rightly so, that the tenant to be regarded is not any particular tenant, but a hypothetical tenant. That tenant must, in my opinion, be taken to be a reasonably careful tenant not given to acts of negligence in his treatment of property or to untenantlike conduct. That is not to say that regard may not be paid to the ordinary mischances and accidents that may occur in any house from inadvertence.

The assumption of such a hypothetical tenant is, in my opinion, a necessity to give any coherence or certainty in the operation of the provisions of the Act. The appropriate factor cannot depend on the reputation of the particular tenant or on the neighbourhood in which the dwelling-house is situated or on an estimate of the conduct of people who stay in or are allowed to visit the house. If negligence were to be treated as a matter to be taken into account, how much negligence is to be assumed? The repair bill is clearly going to vary in proportion to the estimate of the amount of negligence. Some tenants might be grossly negligent, some might be less negligent and some might not be negligent at all. It is impossible to strike an average of negligence, and even if it were it would not be appropriate to all types of tenant and all classes of property. To introduce negligence would also mean that a negligent tenant would benefit by getting a lower appropriate factor, and the greater the negligence assumed the lower would be the appropriate factor within the statutory limits.

Negligence must, in my opinion, be entirely excluded in computing the appropriate factor. The appropriate factor must be computed on the assumption of a tenancy by a hypothetical tenant removed from all considerations of negligence. I would

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accordingly allow the appeal and remit the case to the county court for further consideration. On the other points in the case I agree with what has been said and have nothing to add.

LORD DENNING. My Lords, we are here concerned with the rent which should be paid by the tenant of a small flat which is still controlled by the Rent Acts. In the Rent Act, 1957, Parliament has done away with the old standard rent, and has prescribed instead a "rent limit" for controlled houses. It has laid down a formula for calculating this "rent limit." This formula, naturally enough, takes account of the "responsibility for "repairs." The rent limit goes up or down according as the burden of repairs falls on the landlord or the tenant. This adjustment up and down is effected by means of a variable multiplier called the "appropriate factor" which works in this way: In applying the formula, you start with the 1956 gross value of the dwelling. Then you multiply it by 2 or by 1⅓—or by something in between—according to the "responsibility for repairs." You find this multiplier by seeing what is the responsibility for repairs which falls on the tenant under the terms of the tenancy. If the tenant is responsible for all repairs, the multiplier is 1⅓. If he is not responsible for any repairs, the multiplier is 2. If he is responsible for some, but not all, repairs, the multiplier is such number less than 2 but greater than 1⅓ as may be agreed by the parties or determined by the county court.

The formula does not thus far take any notice of the responsibility of the landlord for repairs: but it is to be observed that the Act contains provisions whereby "in case of disrepair" the tenant can get the multiplier reduced to 1⅓. The result is that, if the landlord wishes to receive the full rent permissible under the rent limit, he must remedy any defects for which the tenant is not responsible.

One other thing to be noticed is that the expression "repairs" in the formula does not include internal decorative repairs. If under the express terms of the tenancy, the landlord is responsible for internal decorative repairs, he can put up the multiplier by another ⅓, so that the top multiplier, for instance, becomes 2⅓ instead of 2.

So far there is no difficulty. The trouble arises when you ask—What is the proper way to calculate the "appropriate "factor"? It is easy enough at the two extremes. When the tenant is under an express obligation to keep the dwelling "in "repair," or "in good repair," or "in good tenantable repair," or "in good and substantial repair," or any such like phrase (with no exception for fair wear and tear or anything else) the multiplier is $1\frac{1}{3}$. When the tenant is not under any express obligation to do any repairs at all, the multiplier is 2. But what is the position when the tenant is expressly liable for "some, but "not all, repairs," as, for instance, in the ordinary case when he is liable to keep the premises in good repair, fair wear and tear excepted? The Act says that, in the absence of agreement, the county court judge is to determine the "appropriate factor" but gives him no guidance as to how to do it.

It is, I think, plain that you must take a hypothetical tenant and assess the responsibility for repairs by estimating what would be the annual cost of the repairs falling on him and what on the landlord. But this leaves the question—What sort of hypothetical tenant are you to take? Are you to take a rough tenant who knocks the place about? or a perfect tenant who never breaks anything? or an average tenant who comes somewhere in between?

Or, to put the question in another way—What defects are you to take into account in making the calculation? In particular, are you to take into account breakages due to the tenant's fault? Suppose, for instance, that the tenant negligently drops a bottle into the washhand basin and breaks it: or suppose that he does not keep his children under proper control and one of them throws a stone through the window. Are you to take breakages of that kind into account when ascertaining the rent limit? A rough tenant will have a lot of such breakages. A perfect tenant none. An average tenant will have some but no one can say how many.

If breakages of this kind are to be taken into account, it will produce a strange result. The judge will have to estimate the annual cost of such breakages to the average tenant and bring it into the calculation in the tenant's favour (as being part of the repairs for which the tenant is responsible) with the result that the tenant will pay a lower rent on account of them. I can see no sense in this. I can see no reason why the landlord should receive less rent—or the tenant pay less rent—simply because the tenant may be expected, in the ordinary course of things, to break windows, wash-basins and the like.

After a close consideration of the Act, I have come to the conclusion that, in calculating the rent limit, you ought not to take into account breakages which are due to the tenant's own fault: for the simple reason that the Act envisages a hypothetical tenant who uses the dwelling in the way that he ought to use it—in the way that the common law expects and requires him to use it—that is to say, a tenant who commits no waste (by which I mean no voluntary waste) and who uses the dwelling in a tenant-like manner, and who does not break any agreement he has made as to his use of it. Such a tenant—you may call him a perfect tenant if you like, but I would call him a reasonable tenant—does not damage the place, wilfully or negligently, he does not break windows or wash-basins, or if he does, he puts it right at his own expense without troubling the landlord about it.

To prove that such is the kind of tenant envisaged by the Act, I would first take a case where the tenancy agreement contains *no express provision* about repairs at all. It was conceded on all hands that in such a case the multiplier is 2. The reason is because there is no term of the tenancy—express or implied—which requires the tenant to do any repairs at all. He is not therefore, under the terms of the tenancy, responsible for any repairs—not even for " some " of them. But, nevertheless he is, by the common law, under an obligation not to commit waste, that is to say, voluntary waste; and he is also under an obligation to use the premises in a tenant-like manner. As I pointed out in *Warren* v. *Keen*,[20] those are not obligations to repair. They are obligations as to his conduct, and user of the premises, and so long as they are fulfilled, as they ought to be, no question of repair arises. It is true, of course, that if the tenant breaks those obligations—as, for instance, if he commits waste by removing partitions or walls (*Marsden* v. *Edward Heyes Ltd.*[21]) or if he uses the premises in an untenant-like manner by breaking windows or doors (*Ferguson* v. *Anon* [22])—he must execute repairs or else pay damages. But in doing so he is not fulfilling an obligation to repair under the terms of the tenancy, express or implied. He is only remedying his own breaches of his common law obligations as to conduct and user. These obligations are altogether separate and distinct from those imposed by a covenant to repair and give rise to separate and distinct remedies, see *Kinlyside* v. *Thornton*,[23] a case of waste, but the same applies, I think, to use in a tenant-like manner. I do not think *Standen* v. *Chrismas* [24] was correctly decided on this point.

Take next a case where the tenant *expressly* agrees not to commit waste and *expressly* agrees to use the premises in a tenant-like manner. The multiplier is still 2. It would obviously

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[20] [1954] 1 Q.B. 15, 20; [1953] 3 W.L.R. 702; [1953] 2 All E.R. 1118.

[21] [1927] 2 K.B. 1.

[22] (1798) 2 Esp. 590.

[23] (1776) 2 W.Bl. 1111.

[24] (1847) 10 Q.B. 135.

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not be right to reduce it simply because the tenant's obligations are express and not implied or imposed by law.

It is quite clear, therefore, that the landlord is given the multiplier of 2 on the basis that the hypothetical tenant is a tenant who commits no waste and uses the premises in a tenant-like manner: and that, if the tenant breaks those obligations, he remedies them at his own expense without any effect on the rent. Thence the multiplier goes down on a sliding scale from the highest factor 2 to the lowest factor 1⅓: but it is obvious that it must proceed on the same basis all the way down the scale—namely, that at every point the hypothetical tenant must fulfil his common law obligations as to conduct and user, and must, therefore, himself remedy defects due to his own fault—and that he is only entitled to have the rent limit reduced by a lower factor than 2 according as more and more repairs fall on him by the express terms of the tenancy over and above those due to his own fault.

There is another reason why I say the Act envisages a tenant such as I have described. If you turn to the provisions which enable a tenant to get the rent limit reduced "in case of "disrepair," you will find that he cannot get it reduced for breakages due to his own fault—see paragraphs 4 (4) and 15 of Schedule I. The underlying assumption clearly is that, during the continuance of the tenancy, the tenant should remedy his own breakages himself at his own expense without affecting the rent limit at all. If that assumption is to be made when *continuing* the rent limit, surely it should also be made when *fixing* it. It would be absurd, *after* the tenancy has started, to reduce the rent because the tenant breaks the washhand basin. So also it would be absurd, *before* the tenancy has started, to fix the rent at a reduced level because the tenant—or rather a hypothetical tenant—might thereafter break a wash-basin.

Mr. Megarry objected to this line of argument. He said that paragraph 15 is confined to "this part of this Schedule," i.e., to Part II, which deals with abatement for disrepair: and that it cannot be called in aid to construe Part I which deals with adjustment of rent limit. This is, I think, too narrow a view. The provisions of Part I can only properly be understood when they are placed in the context of the Act as a whole, and this includes Part II. Take, for instance, the question whether, in ascertaining the appropriate factor for a flat, it is permissible to take into account the cost to the landlord of repairing any defects in the common roof or staircase. There is nothing to help in Part I. The "responsibility for repairs" ordinarily means repairs to the dwelling itself which is let. But in Part II there is paragraph 13 (also expressed to be "for the purposes "of this part of this Schedule") which shows that, in a block of flats, any disrepair of the common roof or common staircase is to be treated as disrepair of the dwelling and entitles the tenant to a reduction in the rent limit. The landlord must therefore remedy any defects in the common roof or staircase if he wants to keep his full rent. It is reasonable to infer that the cost of this work is part of the burden of repairs which falls on the landlord and must be taken into account in the calculation so that he gets a higher rent on account of it. It was so taken into account by the judge in this very case and he relied on paragraph 13 for the purpose. I think he was right in so doing. And paragraph 15 can likewise be used so as to show what breakages can properly be taken into account. I decline to put on one side a most useful pointer to the intention of Parliament which is contained in this very Act.

Thus far I have considered only breakages due to the tenant's own fault, that is, damage done to the dwelling by the tenant himself, wilfully or negligently. Such damage is clearly a breach of his common law obligations and must be excluded from the calculation for the reasons I have given. But what about breakages due to the fault of his family or his guests? These seem to me to stand on the same footing as his own breakages. No reasonably-minded tenant expects his landlord to pay for breakages caused by the negligence of himself or his family or his guests. He expects to pay for them himself: and in law he is, I think, bound to do so without any express stipulation in that behalf. This is because he is under an obligation to use the dwelling in a tenant-like manner, and this obligation, properly understood, extends not only to his own use of the dwelling but also to the use made of it by those claiming under him. After all, if they do damage to the premises, wilfully or negligently, the tenant can recover the full damage from them. He can rely on his possession for this purpose: for as against them, his possession is title. (He is, of course, unable to sue his wife, but that is a rule of procedure, not of substance, and does not affect the principle.) It is only reasonable, therefore, that the tenant should be accountable to the landlord for the damage done by them. This was clearly the view of the experienced surveyor for the tenant Mr. Russell-Davies, who said in evidence: "I had no thought that anybody but the tenant "would be liable for rough treatment or negligent treatment." It was the same view as I expressed a few years ago in *Warren* v. *Keen* [25] when, speaking of the tenant's obligations, I said: "He must, of course, not damage the house, wilfully or "negligently; and he must see that his family and guests do not "so damage it: and if they do, he must repair it."

It follows that the hypothetical tenant envisaged by the Act is a tenant who does not himself damage the dwelling, wilfully or negligently, nor does anyone claiming under him so damage it: and the rent limit must be calculated on that footing. This fits in well with paragraph 15, which says that the tenant cannot get the rent limit reduced for "defects which are due to any "act, neglect or default of the tenant, *or any person claiming* "*under him.*"

I would also point out that, if the tenant expressly agrees to use or not to use the premises in a particular way, as for example, not to drive nails into the wall—and he breaks his agreement—he cannot bring in the cost of remedying it as an item in his favour. He cannot get the rent limit reduced on that account, see paragraph 15; and he cannot claim to have a lower rent fixed on account of it — or the possibility of a hypothetical tenant doing it.

The next question is what is the effect of the exception of "fair wear and tear" in a repairing covenant. I find myself in full agreement with what Talbot J. said on this subject in *Haskell* v. *Marlow*.[26] I think the Court of Appeal in *Taylor* v. *Webb* [27] were wrong in overruling *Haskell* v. *Marlow*.[28] I have never understood that in an ordinary house a "fair wear and "tear" exception reduced the burden of repairs to practically nothing at all. It exempts a tenant from liability for repairs that are decorative and for remedying parts that wear out or come adrift in the course of reasonable use, but it does not exempt him from anything else. If further damage is likely to flow from the wear and tear, he must do such repairs as are necessary to stop that further damage. If a slate falls off through wear and tear and in consequence the roof is likely to let through the water, the tenant is not responsible for the slate coming off but he ought to put in another one to prevent further damage.

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[25] [1954] 1 Q.B. 15, 20.

[26] [1928] 2 K.B. 45.

[27] [1937] 2 K.B. 283.

[28] [1928] 2 K.B. 45.

The third question is whether rule 1 is subject to the exception of "fair wear and tear." In so far as the rule covers the same field as clause 2 (D)—that is, in respect of sanitary and water apparatus—it is subject to the exception, because the clause in the deed must take precedence over the rule. It follows that when the washer on a tap wears out and has to be remedied, or a cistern has to be regulated, or a radiator leaks, the tenant is not liable, because it is fair wear and tear. The defect must be made good by the landlord if he wants to get his full rent. It is part of the burden which falls on him. The circular which the landlord sent round to the tenants recognises this burden and does not need separate consideration. In so far as the rule refers to damage occasioned by improper use or negligence of the tenants or their servants, this is not "fair wear and tear" and the tenant must put it right: but the cost does not come into the calculation for the reasons I have already given. In so far as the rule refers to notices served by the water and sanitary authorities, these are all due, as Mr. Dale said, "to plumbing and to leaks," that is, to sanitary and water apparatus. These are, therefore, like the first part of the rule, subject to the exception of fair wear and tear, and the cost of remedy forms part of the landlord's burden.

This brings me to a consideration of the judgment of the county court judge. He seems to have made his calculation in this way:

1. He took the estimated annual cost of repairing the roof and exterior of this block of flats and of the common lifts and staircases: and he apportioned it to this flat. The figure came to £5 10s. He held this was a burden resting wholly on the landlord. This was clearly right.

2. He took the estimated annual cost of repairing the inside of the flat (excluding decorative repairs) including fair wear and tear but *excluding damage due to negligence.* This figure was given by Mr. Dale at £4 5s. and seems to have been agreed by the parties. The judge held that £1 15s. of it rested on the landlord (presumably for fair wear and tear) and £2 10s. on the tenant (of which 10s. was under his general covenant to repair and £2 under rule 1). I doubt whether the judge was right about this £2. The figure was given by Mr. Dale who said £2 would be spent on washering the taps and regulating the cistern. This looks to me like fair wear and tear and, if so, it should rest on the landlord.

3. He took the estimated annual cost of repairing breakages, such as cracked washhand basins, broken windows, bath panels,

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and so forth, due to *carelessness*. He had no evidence before him on which to estimate the figure, but he put it at a figure of £7 7s. less the £2 10s., namely, at £4 17s. He held that this was a burden resting wholly on the tenant. I do not think the judge was right about this. He ought to have excluded all damage and breakages due to any act, neglect or default of the tenant or any person claiming under him. Also all damage, such as driving nails into the walls, which was due to any breach of the clauses in the tenancy agreement. Incidentally, I notice that both surveyors said they would not like to estimate damage due to negligence, because it depended so much on the particular tenant. By which I take it there is no average tenant for this purpose. The right way to deal with it is to exclude negligence altogether.

In view of these errors by the county court judge, I think the proper course is to send the case back for the calculation to be made afresh. I agree with the views expressed by my noble and learned friend, Lord Keith of Avonholm, and I would allow the appeal accordingly.

Appeal dismissed.

Solicitors: *Stikeman & Co.; Graham Page & Co.*

F. C.

[HOUSE OF LORDS.]

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Oct. 27, 28; *Nov.* 25.

CARSON (INSPECTOR OF TAXES) . . APPELLANT;

AND

CHEYNEY'S EXECUTOR . . . . . RESPONDENT.

Revenue—Income tax—Discontinuance of trade or profession—Author—Death—Royalties arising from author's contracts—Payment after death—Whether assessable—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases II, III, VI—Income Tax Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *Sch. D, Cases II, III, VI.*

After the death in 1951 of C., an author, certain sums due as royalties under agreements made by him were paid to his executor. There were produced four representative examples of these agreements, three dealing with works which at the dates of the agreements were not yet written and in which, therefore, there was not copyright or property, and the fourth dealing with the publication in French of an extant work already the subject of copyright. During his life C. had been assessed to income tax (properly, as the Crown admitted) in respect of royalties received under the agreements as profits arising from the carrying on of his profession as an author under Case II of Schedule D:—

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD KEITH OF AVONHOLM.

Held, that the payments were the fruit or aftermath of professional activity, whatever the mechanism through which they were paid, and did not change their character when the profession was discontinued. This was equally true of all the contracts here in question and, accordingly, the executor was not liable to be assessed to income tax on sums received under them.

Stainer's Executors v. *Purchase* [1952] A.C. 280; [1951] 2 T.L.R. 1112; [1951] 2 All E.R. 1071 applied.

Decision of the Court of Appeal [1958] Ch. 345; [1957] 3 W.L.R. 768; [1957] 3 All E.R. 391 affirmed.

APPEAL from the Court of Appeal (Jenkins, Parker and Pearce L.JJ.).

This was an appeal from an order dated October 21, 1957, of the Court of Appeal, dismissing an appeal by the appellant, Gilbert Carson (Inspector of Taxes), from an order dated June 6, 1957, of the Chancery Division of the High Court of Justice (Queen's Remembrancer) (Harman J.) whereby an appeal by the appellant on a case stated by the Commissioners for the General Purposes of the Income Tax for the Division of Bromley in the County of Kent was dismissed and the determination of the General Commissioners was affirmed. The respondent, William Alexander Roy Collins, the sole surviving executor of the late Reginald Evelyn Peter Southouse Cheyne (known as "Peter "Cheyney"), a well-known writer of detective fiction, was throughout the proceedings referred to as "Peter Cheyney's "executor." The question at issue was whether he was assessable to income tax under Schedule D in respect of royalties received by him as such executor under contracts with publishers entered into by Peter Cheyney during his lifetime with a view to the publication of books written or to be written by him.

The determination of the General Commissioners was made on appeal to them by the respondent against first and additional assessments to income tax made on him under Schedule D for the years 1951–52 and 1952–53 and totalling £10,000 for the first and £18,000 for the second of those years. The assessments for 1951–52 were governed by the Income Tax Act, 1918, and those for 1952–53 by the Income Tax Act, 1952, but it was common ground between the parties that there was no material difference between the relevant provisions of the two Acts. By section 123 of the Act of 1952 income tax was chargeable under Case III of Schedule D in respect of (inter alia) "any interest of money, "whether yearly or otherwise, or any annuity, or other annual "payment," under Case V of the same Schedule in respect of "income arising from possessions out of the United Kingdom," and under Case VI of the same Schedule in respect of "any "annual profits or gains" not falling under any of Cases I to V and not charged by virtue of Schedule A, B or C.

The facts are fully stated in the opinion of Viscount Simonds.

Sir Reginald Manningham-Buller Q.C., *A.-G.*, *Hilary Magnus Q.C.* and *Alan Orr* for the appellant. The deceased had 50 or 60 agreements with publishers for books written or to be written by him. He was assessed in respect of his receipts under Case II of Schedule D—"tax in respect of any profession "or vocation not contained in any other Schedule." The receipts were treated as part of the profits of his profession and all allowable expenses were deducted. No question arises as to the assessments made in his lifetime. This case concerns receipts by the executor after his death under contracts made by the deceased. The question is whether they were solely remuneration for the professional activities of the deceased in writing books. If so, the case is governed by *Stainer's Executors* v. *Purchase.*[1] But the sums were not so paid. The sums received, which were expressed in the agreements to be payable as royalties, were paid in consideration of licences to use the copyright. They were mere income from property, and that character was always the same and did not change because of the death of the deceased. Though they were treated in his lifetime as part of the receipts of his profession, they still retained their character of income from property after his death, so that some of it was taxable under Case III or Case V, so far as it was not taxed under Case VI. This income is received from a piece of property created by the deceased. It is not said that the payments altered in character; by reason of the death of the deceased the payments were no longer taxable in respect of a profession under Case II.

If these royalties were simply remuneration for writing books, a successful author could so arrange his affairs as to retain and enjoy for years, and perhaps for the rest of his life, a tax-free income depending on the sales of his books.

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[1] [1952] A.C. 280; [1951] 2 T.L.R. 1112; [1951] 2 All E.R. 1071.

Until the decision in the present case *Stainer's* case [1] was generally thought not to apply to royalties paid in respect of the copyright of a book, and the practice of the Revenue has been based on that assumption.

The respondent has admitted liability in respect of sums received under contracts made by him, but says that the agreements relating to the sums now in question were mere machinery for securing the remuneration. If that be right it is hard to see why the tax liability was admitted in the case of the other contracts. No distinction can be drawn. By writing books the deceased created property, and income was derived from dealings with that property, just as much as was the income received by the respondent under contracts made by him. The contracts were the means adopted by the deceased to exploit property created by him, his copyrights. The distinguishing feature between this case and *Stainer's* case [1] is that the latter was clearly a case of remuneration for services.

The agreement in respect of the work to be written by the deceased and called " Making Crime Pay " is not an agreement to pay him for writing a book, but to pay him for the right to publish it. On the terms of the agreements he was never under contract to write a book. A similar agreement could have been made in respect of a manuscript already written by the author or even bought from someone else. This agreement and others were providing for what was to happen when the books came into existence.

The agreements in *Stainer's* case [2] were materially different from those here; there were no payments in respect of copyright. That case is not, of course, challenged, but the facts, although possessing certain similarities, are so essentially dissimilar as to produce a different result. Lord Asquith's distinction [3] between " income bearing assets " and the contracts in question does not provide a good basis for future decisions: see *Bennett* v. *Ogston.*[4] Interest on a promissory note has a real taxable character. Even if the recipient did not trade as a moneylender, and it was a case of an individual advance, the interest paid would be taxable. If he developed a trade as a moneylender, the interest would be taxable as a receipt of the business. If the trade ceased, it would remain taxable under Case III. It is fundamental that, as in *Bennett* v. *Ogston*,[4] the executor's receipts here did not change in character from the receipts of the deceased. All through there was here a dealing with property, so that all the time there was a receipt from property. After the trade or profession ceased, it simply fell into another compartment. These were always receipts from property, but during the life of the deceased they were also receipts of his profession and were brought into account as such. The licence to publish the book might be granted 10 or 20 years after it was written and it would be ridiculous to treat it as remuneration earned in the writing of the book.

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[1] [1952] A.C. 280.

[2] (1950) 32 T.C. 367, 396, 399–400; [1952] A.C. 280, 287, 288.

[3] [1952] A.C. 280, 291.

[4] (1930) 15 T.C. 374.

Copyright is property: see *Curtis Brown Ltd.* v. *Jarvis.*[5] Copyright royalties may be merged in the receipts of a trade. See also *Beare* v. *Carter*[6] and *Inland Revenue Commissioners* v. *Sangster.*[7]

The contracts here are clearly not a reward for services. In the case of the memoirs of a famous person who was reluctant to write, the contract might be so framed as to secure the actual writing, the services, but that would be different from the present case, where the contract is not mere machinery to pay for the services of writing the book. This is particularly clear in the case of the contract relating to translation rights.

As income from property, royalties paid in respect of the publication of copyright works fall within section 122 of the Income Tax Act, 1952. All the agreements here entered into by the deceased were dealing with the disposition of the assets represented by the books which he had written. On the wording of the contracts, what he was receiving was not remuneration for writing but receipts of his profession: see the definition of "earned income" in section 525 of the Act of 1952. If these receipts were always income from property within section 122, they do not cease to be taxable because for a time they have been brought into account under Case II. There can be a merger and the Cases can overlap.

This case can be compared with the insurance company cases. Where a particular receipt is covered by more than one Case the Crown has an option under which to proceed. Here, because of this dual character, the receipts do not cease to be taxable when the profession or trade ceases to be carried on: see *Revell* v. *Edinburgh Life Insurance Co.*[8] and *Liverpool and London and Globe Insurance Co.* v. *Bennett.*[9]

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[5] (1929) 14 T.C. 744, 749–750, 751.

[6] [1940] 2 K.B. 187, 189, 193; 56 T.L.R. 762.

[7] [1920] 1 K.B. 587, 590, 594; 36 T.L.R. 158.

[8] (1906) 5 T.C. 221.

[9] [1912] 2 K.B. 41, 56; 28 T.L.R. 279; [1913] A.C. 610; 29 T.L.R. 757.

As to the nature of royalties, see also *Lawrence* v. *Inland Revenue Commissioners*.[10]

The decision in *Stainer's* case [11] does not apply here, although it is a correct decision on its own facts. That case was one of remuneration for services and the present case is remuneration in relation to dealings with copyrights. There is no dispute that the deceased was correctly assessed in his lifetime. It may be that he might have been taxed under Case III, but, however that may be, his receipts, both before and after his death, were always of an income character within section 122. Since Case II cannot apply after his death or retirement, they are taxable under Case III, V or VI. The payments have not altered their character by his death; all that has changed is that they can now be taxed under another Case. They constituted a substantive subject-matter of taxation under Schedule D. Suppose a man wrote one book in his lifetime; that would not be carrying on a profession, but it would not be disputed that the receipts were nevertheless taxable. It cannot, of course, be maintained that anything which is not pure income profit can be taxed under Case III: see *Asher* v. *London Film Productions Ltd.*[12] and *Davies* v. *Braithwaite.*[13]

Hilary Magnus Q.C. following. The fact that a particular category of payment is capable of being entered in a profit and loss account does not exhaustively define its character in the taxpayer's hands.

On the assumption that there was no option during the continuance of the profession, then if the House is satisfied that this income always had a dual character, there is no reason in principle why the Case of Schedule D under which it falls to be taxed should not change with the circumstances. This may be illustrated from the type of income which falls within Case VI.

If a boatbuilder let out boats on hire, the profits would be charged to tax as profits of his trade and the Crown would have no option. But if the boatbuilder died and one boat remained available for letting, being let out under the terms of a contract, the profits would then be charged under Case VI instead, since, if the executor did nothing but collect the receipts, he would not be carrying on a business.

These royalties were capable of entering into a Case II computation because their source was a professional asset; they merged in the profession. But, once the royalties are divorced from the profession, they can be pure income profits.

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[10] (1940) 23 T.C. 333.

[11] [1952] A.C. 280.

[12] [1944] K.B. 133; 60 T.L.R. 115; [1944] 1 All E.R. 77.

[13] [1931] 2 K.B. 628; 47 T.L.R. 479.

Viscount Bledisloe Q.C. and *C. N. Beattie* for the respondent. The deceased was a writer. Leslie Howard was an actor. The work of the deceased is recorded in books. The work of Leslie Howard is recorded in films. Neither the writing nor the acting had any monetary value until they were exploited. Both cases were fundamentally the same. Both men were assessed during their lifetime under Case II of Schedule D. This case is, accordingly, completely covered by *Stainer's* case.[14]

The copyright point is a "red herring." It is a right to prevent others from reproducing a particular literary or artistic work. The existence of that right merely enhances the value of an author's professional activities. It affects "quantum" and nothing else. As to this point, see what Jenkins L.J. said in the Court of Appeal in the present case.[15] As to the contracts in *Stainer's* case,[16] the report of the decision at first instance shows that copyright was being dealt with there also. As to copyright in films, see Copinger on Copyright, 8th ed., p. 221. In a sense the exploitation of copyright produced the royalties paid to Leslie Howard. The mere fact that the law gives an author a right of copyright does not alter the fact that the royalties paid to him are earnings of his profession under Case II.

The deceased here was under contract to write books. His professional activities were writing books and were nothing else.

To succeed, the Crown must show a change in the nature of the payments after the death of the deceased: see *Stainer's* case.[17] If the character did not change, the income tax compartment of the payments cannot change. See what Jenkins L.J. said in the present case in the Court of Appeal.[18] The question whether or not the Crown had an option to proceed under one Case of Schedule D or another was argued in *Stainer's* case,[19] but the point is not really open here. From a practical point of view, a man making a film or writing a book incurs expenses, and if he were taxed under Case III he would not be able to deduct them.

The Crown must show a change in the nature of the payments. By their nature they are either the fruits of professional activities or pure income profits. In the lifetime of the deceased they could not have been charged on the latter basis. If the deceased had bought someone else's copyrights, no doubt the proceeds would have been taxable under Case III: see *Asher's* case [20] and *Stainer's* case.[21] A man cannot carry on a profession merely by producing something. These contracts were necessary machinery for exploiting the work of the deceased, but they were mere machinery. If he had retired, the position as regards the payments would have been just the same as on his death.

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[14] [1952] A.C. 280.

[15] [1958] Ch. 345, 372; [1957] 3 W.L.R. 768; [1957] 3 All E.R. 391.

[16] (1949) 32 T.C. 367, 372, 379.

[17] [1952] A.C. 280, 288–289.

[18] [1958] Ch. 345, 362, 370–371.

[19] 32 T.C. 367, 402; [1952] A.C. 280, 288.

The Case II assessments during the lifetime of the deceased exhausted his liability to pay tax under Schedule D. These contracts were not income bearing assets in his hands: see *Stainer's* case.[22] Both that case and the present case are limited in their application to funds coming to executors under such contracts.

As to the agreement relating to the intended translation into French, the deceased was rightly taxed in respect of the payments thereunder under Case II because the translation would be a new work in French with its own copyright.

The case of an artist commissioned to paint a picture is not different from that of another who paints a picture, exhibits it and sells it. The receipts of the first are clearly from a professional activity. Those of the second are not from an exploitation of property. There is no distinction. Both are professional earnings.

Bennett v. *Ogston* [23] correctly states the principle involved here (see *Stainer's* case [24]), though the judge did not rightly apply the principle to the case before him.

It is true that the deceased was being paid for the right to publish, but the manuscripts had only a potential value, and before he could get professional remuneration he had to exploit them by granting the right to publish. The mere production of a manuscript does not produce professional remuneration.

Although the executor did not dispute liability in respect of receipts under contracts made since the death of the deceased, that should not be used in argument against him, because he may be mistaken.

Curtis Brown Ltd. v. *Jarvis* [25] and *Beare* v. *Carter* [26] have no relevance here. The statements made in *Inland Revenue Commissioners* v. *Sangster* [27] are right in the context of that case

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[20] [1944] K.B. 133.

[21] [1952] A.C. 280, 289.

[22] 32 T.C. 367, 404; [1952] A.C. 280, 288–289.

[23] 15 T.C. 374, 378.

[24] [1952] A.C. 280, 291.

[25] 14 T.C. 744.

[26] [1940] 2 K.B. 187.

[27] [1920] 1 K.B. 587.

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but can only be read in that context—that Sangster was not carrying on business, as Rowlatt J. emphasised.[28]

Sir Reginald Manningham-Buller Q.C., A.-G. in reply. It is conceded that during the lifetime of the deceased there was no option to assess these items under Case III. The insurance cases were cited, not in relation to option, but to show that receipts can at one time be taxed under one Case and at another time be taxed under another Case.

Stainer's case[29] was not dealing with the exploitation of copyright. The facts were quite different from those of the present case: see *per* Jenkins L.J.,[30] Viscount Simonds[31] and Lord Asquith.[32]

On the respondent's argument the deceased could have retired and enjoyed a tax-free income. These were not agreements to secure the writing of a book; they were not so expressed. It is not contended that there was a change in the nature of the payments. While the profession was being carried on they had superimposed on them the character of professional earnings, but when that character was removed they did not escape the Income Tax Acts. There can be fruits of activities which bring rewards in different ways. Though there is no change in the nature of the payments, there may be a change in their income tax compartment. These payments were always royalties arising from copyright but they were also professional earnings. After the death they fell into Case III and Case VI. If there had been no profession they would always have been taxable.

The key to *Bennett* v. *Ogston*[33] is at the end of the judgment.

Their Lordships took time for consideration.

November 25. VISCOUNT SIMONDS. My Lords, the question for your Lordships' determination is whether the Commissioners for the General Purposes of the Income Tax, Harman J. and the Court of Appeal were all wrong in holding that the respondent, who is the executor of a well-known writer of detective fiction, known as Peter Cheyney, is not assessable to income tax under Schedule D in respect of royalties which were received by him as such executor under contracts made by Peter Cheyney during his lifetime.

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[28] [1920] 1 K.B. 587, 595.

[29] [1952] A.C. 280.

[30] 32 T.C. 367, 406.

[31] [1952] A.C. 280, 289.

[32] Ibid. 290.

[33] 15 T.C. 374, 379.

I will summarise the facts as they appear in the case stated by the General Commissioners and the annexed documents.

Peter Cheyney was a writer by profession and he carried on his profession, as writers often do, by entering into contracts with publishers under which, in return for royalties of varying amounts, the copyright in his works became vested in them. These contracts, which were numerous, took various forms. In some cases, notably in a contract made with Faber & Faber Ltd. relating to a work described as "provisionally entitled 'Making Crime "'Pay,'" the work in question had not yet been written or at any rate not completed at the date of the contract. In others the work had been completed and there was therefore an existing copyright in it. In one case, which has been regarded as demanding special consideration, the contract took the form of a licence to translate an existing work into French. Subject to what may be said about the last mentioned contract, I do not think that any distinction can validly be made between any of the contracts. In all of them the author carried on his profession by exploiting his work in the usual way. A writer might, I suppose, carry on his profession without doing so, but the Income Tax Acts contemplate the carrying on of a profession for gain, and that is what Peter Cheyney did. He was accordingly assessed during his lifetime under Case II of Schedule D in respect of the royalties so received by him after deducting therefrom all proper and allowable expenses of carrying on his profession. There is no doubt that he was rightly so assessed, and the learned Attorney-General very properly admitted that he could not lawfully have been assessed under any other Case of any other Schedule. It must be recorded also that he was consistently assessed upon a form of receipts basis, being credited with royalties upon the day when they fell due for payment and no account being taken of the present value of royalties due at a future date.

Peter Cheyney died on June 26, 1951. Royalties falling due under the several contracts after his death were received by his executor, and upon him first and additional assessments were made under Schedule D for the years 1951–52 and 1952–53 in the sums of £10,000 and £18,000 respectively. The question is whether they were rightly made. The executor also received sums in respect of contracts made by him with publishers after Peter Cheyney's death and admitted his liability to assessment in such sums. He may have been right or wrong in doing so. That question has not been in dispute nor have their Lordships seen the contracts. The matter is irrelevant to the present issue.

The assessments for 1951–52 are governed by the Income Tax Act, 1918, and those for 1952–53 by the Act of 1952, but there is no material difference between the relevant provisions of the two Acts. It is enough, therefore, to refer to section 123 of the 1952 Act under which income tax is chargeable under Case III of Schedule D in respect of " any interest of money, " whether yearly or otherwise, or any annuity, or other annual " payment," under Case V " in respect of income arising from " possessions out of the United Kingdom " and under Case VI " in respect of any annual profits or gains not falling under any " of the [Cases I to V] and not charged by virtue of Schedule A, " Schedule B, Schedule C or Schedule E."

It was not stated in the assessments under which of the Cases of Schedule D they were made, and I understand that it is not considered necessary to do so. Before the commissioners and before the courts below it was contended that they were properly made under Case III or, alternatively, under Case VI. Before this House Case V was also invoked, but in the view which I take nothing turns on this.

My Lords, it was inevitable that a large part of the argument should turn on a recent decision of this House in which two of your Lordships and I took part, the respondent contending that it governed the present case, the appellant that it was distinguishable. I refer to *Stainer's Executors* v. *Purchase*.[1] In that case I said that I agreed with and adopted every word of the judgment of Jenkins L.J. in the Court of Appeal, and I repeat what I then said in regard to the judgment of the Court of Appeal delivered by the same Lord Justice in the present case. I therefore absolve myself from the need to compare at length the facts of the two cases and will state as shortly as I can the facts and the principles which appear to emerge from the earlier decision.

Stainer's case,[1] as I will call it, was concerned with assessments made upon the executors of Stainer, a professional film actor and producer (who went by the name of Leslie Howard), in respect of payments made to them under contracts for the exploitation of films to the making of which Leslie Howard had given his professional services as actor or producer or director. The payments consisted of percentages or shares of the profits of exploitation. During his lifetime he was assessed under Case II, his receipts in respect of all his professional activities being brought into account against his proper expenses of carrying on his profession. After his death further payments were made to his executors under the same contracts. It was not suggested that anything further had to be done to earn these payments. They were the reward for Leslie Howard's professional services rendered during his lifetime. It was, however, contended on behalf of the Crown, just as it has been contended in the present case, that they had after the death of Leslie Howard acquired a new taxable quality and, as they were no longer assessable under Case II since no profession was being carried on, were assessable under Case III or Case VI. This contention was decisively rejected. Jenkins L.J. said [2]: " I think it is equally clear that " the assessment to tax of the profits of a profession under Case " II of Schedule D down to the date of discontinuance is to be " taken as covering all remuneration earned in the course of such " profession whether received prior to or after such discon- " tinuance and that, the liability to tax being thus exhausted so " far as remuneration is concerned, nothing which is in truth " remuneration so earned can afterwards be charged to tax merely " because the mode of ascertaining and paying it is such that it " might have been charged to tax under some other Case if it " had not been remuneration so earned." In a speech, in which the other members of the House concurred, I expressed the same view with equal emphasis and less felicity. The principle which emerges is clear. Payments which are in historical fact (I adopt the language of the late Lord Asquith of Bishopstone [3] in the same case) exclusively the fruit or aftermath of professional activities do not change their taxable character when the profession is discontinued.

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[1] [1952] A.C. 280; [1951] 2 T.L.R. 1112; [1951] 2 All E.R. 1071.

But there was another aspect of *Stainer's* case [4] which is relevant to the present case. Perhaps it is no more than a different way of stating the same point. It was urged that the contracts made by Leslie Howard were " income bearing assets " and that the payments made to his executors were the income of such assets. To this the same noble Lord gave an answer which I venture to quote, so completely does it dispose of a similar argument in the present case. " The contracts," he said,[5] " in " the present case enjoy, in my view, no such independent " vitality. The consideration for what Mr. Howard was to do— " to act or manage—was not the grant of a contract or contracts " but the payment of money under the terms of those contracts. " Mr. Howard acted for money; he did not act for contracts. " The contracts were mere incidental machinery regulating the

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[2] (1950) 32 T.C. 367, 404.

[3] [1952] A.C. 280, 290.

[4] [1952] A.C. 280.

[5] Ibid. 291.

"measure of the services to be rendered by him on the one hand "and, on the other, that of the payments to be made by his "employers; they were not the source, but the instrument of "payment, and his death, in my view, did nothing to divest "them of that character." My Lords, I do not see how in the face of this decision the appellant's argument can succeed without a degree of refinement which is to be avoided in the realm of fiscal law. In *Stainer's* case [6] it could not be denied that the taxpayer acquired under his contracts certain contractual rights nor that those rights could in a certain context be called property. So it was argued that the payments were the income and the contracts were the "income bearing assets." I will again content myself with the description given to this argument by Jenkins L.J. and ask how it is to be distinguished from the argument in the present case. When I do so, I find myself using again the same language that Lord Asquith used and I used in *Stainer's* case.[6] What else were these payments than the fruit of Peter Cheyney's professional activities? How is it relevant that in order to reap his harvest he had to enter into contracts under which he acquired rights and incurred obligations, as did the publishers with whom he contracted? And how is it relevant that it was a term of those contracts that there should be vested in the publishers a right created by the law to protect him in the exploitation of his work? It was by entering into such contracts that he was able to carry on his profession gainfully. It was because he did so that he was assessable to tax under Case II of Schedule D. I reject, therefore, the plea that the royalty payments could, whether during the carrying on of the profession or after its discontinuance, be regarded as "income from property, "constituting a substantive subject matter of taxation under "Schedule D"—I use the words of the appellant's formal case. I will only add in deference to the ingenious argument of the Attorney-General that the realities of the situation are not changed by saying that the royalties were throughout paid in consideration of the grant of a licence to use copyright and were therefore the income of property, that during the carrying on of the profession they could be regarded as income under Case II but that, having always the character of income of property, they became taxable in that character when the profession was no longer carried on. This is really only saying the same thing in other words and is to be similarly answered. First and last and all the time the payments are professional earnings, whatever be the mechanism through which they are paid. Upon this part of the case I will offer a final consideration. In *Stainer's* case [7] I said: "If in all the circumstances it was not possible to bring "the sums into account in the years in which they were earned ". . . the result is not to change the character of the payment "but to exhibit that some professional earnings may escape the "income tax net." There, I believe, lies the root of the trouble. Prima facie there is no reason why a professional man should not be taxed on an earnings basis, but in the case of an author, whose earnings depend on the unpredictable popularity of his books in future years, an assessment in the earning year would be so arbitrary as to be patently unfair. But that, I repeat, does not entitle the Crown to regard payments in future years as anything but what they essentially are.

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[6] [1952] A.C. 280.

An attempt was made, as I observed some time ago, to distinguish the contract under which Peter Cheyney granted a licence to translate one of his novels into French. Harman J. felt some difficulty about the royalties paid under this contract, but I have come to the conclusion, as did the Court of Appeal, that the distinction is too fine to be material. It appears to me that by this as by his other contracts the author was exploiting the work of his brain. The fees or royalties that he got were part of his professional earnings and during his life were, no doubt, included in his assessment under Case II. After his death they cannot validly be distinguished.

It is not necessary, my Lords, to say anything about Case VI or Case V. The reasons for dismissing an appeal which relies on Case III are fatal to them also.

In the course of the argument a number of authorities were referred to. Apart from *Stainer's* case [8] and the case of *Bennett* v. *Ogston* [9] concerning which I can say no more than I said in *Stainer's* case,[10] I do not think that any of them can throw any light on the present problem. I doubt not that in a proper context royalties may be described as income of an investment as in *Inland Revenue Commissioners* v. *Sangster* [11] nor that, as in *Curtis Brown Ltd.* v. *Jarvis*,[12] copyright royalties may be merged in the receipts of a trade, but I do not think that these cases assist in the solution of the problem now before the House.

The appeal should, in my opinion, be dismissed with costs.

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[7] [1952] A.C. 280, 289.

[8] [1952] A.C. 280.

[9] (1930) 15 T.C. 374.

[10] [1952] A.C. 280.

[11] [1920] 1 K.B. 587; 36 T.L.R. 158.

[12] (1929) 14 T.C. 744.

LORD MORTON OF HENRYTON. My Lords, it appears from the case stated that during his lifetime Peter Cheyney had entered into from 50 to 60 agreements with publishers to write books, or for the publication of books already written. Four only of such agreements were put in evidence, and it was agreed between the parties that the decision of the court as to sums paid under these four agreements should apply to moneys paid under all other agreements, unless the court should distinguish one of these four agreements from another. It was further agreed that all the agreements made by the deceased from which royalties arose could, as regards form, be classified into one of the categories of which these four agreements are representative.

The agreements were exhibited to the case and marked respectively A (i), A (ii), A (iii), and A (iv).

My Lords, as regards the agreements A (i) and A (ii), there is, to my mind, no valid distinction between the present case and the case of *Stainer's Executors* v. *Purchase.*[13] In the present case Cheyney was remunerated for writing books which were "to be "written"; in *Stainer's* case [13] Leslie Howard was remunerated for producing or directing or acting in films. It is possible to point to differences in the form which the remuneration took, but in each case the remuneration was for professional activities to be carried out by a man carrying on a profession.

In the case of A (iii) it is not quite clear whether the four works to be "delivered" to the publishers had been written or were about to be written, but I see no reason for assuming, in favour of the Crown, that they had already been written, and the Attorney-General did not at any time seek to distinguish this agreement from A (i) and A (ii). Agreement A (iv) is of a somewhat different nature, in that it related to a work already published entitled "Making Crime Pay." By the agreement, the author granted to the publishers the sole licence to translate the work and publish it in volume form in the French language. It could possibly be said that the author had finished his professional activity in regard to the book by writing it, and that the sums to be received under this agreement were income arising from property, namely, from the copyright in the book, within section 122 of the Income Tax Act, 1952, and were taxable under section 123 of the same Act, either as coming within Case III or, as the publishers were a French firm, within Case V. However, no point of this kind was raised by the Crown during the author's lifetime, and the Attorney-General did not seek now to draw any distinction between this agreement and the other three. I think it can fairly be said that these sums had "the essential quality "of being the fruit of his professional activity," to quote from the speech of Viscount Simonds L.C. in *Stainer's* case,[14] and none the less so because they were received in respect of a completed work. As Jenkins L.J. put it, in delivering the judgment of the Court of Appeal[15]: "It" (that is, the copyright) "was brought "into existence by his professional activity in the writing of "books and by nothing else, and it was just as much part of his "profession to turn his literary labours to account by licensing "the copyright he had created to publishers as it was to write the "books in which the copyright subsisted." If the sums in question had the quality of professional earnings during the author's lifetime, I cannot see that his death in any way changed their quality.

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[13] [1952] A.C. 280.

I would dismiss the appeal.

LORD REID. My Lords, Peter Cheyney, who died on June 26, 1951, was a well-known author. At that date he had some 50 or 60 agreements with publishers in this country and abroad, under which he was entitled to receive from time to time royalties and other sums. During his lifetime he was assessed to income tax under Case II of Schedule D in respect of his earnings in his profession of authorship. The "full amount of "the profits or gains" of his profession was computed by taking as his receipts in each year all sums falling due to be paid to him during the year under these agreements, and deducting all allowable expenses incurred by him during the year. No question arises as to tax due in respect of the period before his death.

Royalties due under these agreements continued to be paid to Cheyney's executor after his death, and in respect of these royalties assessments under Schedule D were made on the executor totalling £10,000 for the year 1951–52 and £18,000 for the year 1952–53. The executor, the respondent in this appeal, appealed against these assessments, and the assessments were discharged by the commissioners. An appeal against this decision by the present appellant was dismissed by Harman J., and a further appeal was dismissed by the Court of Appeal on October 21, 1957.

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[14] [1952] A.C. 280, 289.

[15] [1958] Ch. 345, 372; [1957] 3 W.L.R. 768; [1957] 3 All E.R. 391.

A taxpayer who in any year earns a right to receive money by trading or by the exercise of his profession may not receive that money or it may not become payable during the year when he acquired the right to receive it. So, when his trade or profession is discontinued, there may be sums, often large sums, outstanding. And there may also be expenses allowable as deductions which he has not yet paid. The question may then arise whether or to what extent such postponed receipts can be taken into computation for income tax purposes. By one method of accounting his profits or gains during each year can be computed by taking, not the sums which he has actually received during the year, but the sums which he has earned during the year. Receipts during the year which have been taken into computation in previous years as having been earned then will not swell the computation for the year in question, but this computation will take account of what has been earned during the year in question though not yet received. In that way, money earned during the continuance of the trade or profession but not payable or received until after its discontinuance would not escape from computation for income tax. But that method was not adopted in the present case. Probably it could not have been adopted, if only because it was impossible to determine the amount of royalties which might ultimately accrue: any estimate of their amount would have been a mere guess.

In the ordinary case of professional earnings, which are outstanding when the profession is discontinued, and which cannot be brought into computation for the period before the discontinuance, it has long been recognised that there is no provision in the Income Tax Acts which subjects them to charge and that they therefore escape from taxation. I need only refer to the statement of the law by Rowlatt J. in *Bennett* v. *Ogston*[16] quoted with approval by my noble and learned friend, Lord Simonds, in *Stainer's Executors* v. *Purchase*[17]: "When a trader or a "follower of a profession or vocation dies or goes out of business ". . . and there remain to be collected sums owing for goods "supplied during the existence of the business or for services "rendered by the professional man during the course of his life "or his business, there is no question of assessing those receipts "to income tax: they are the receipts of the business while it "lasted, they are arrears of that business . . . and are taken to be "covered by the assessment made during the life of the business, "whether that assessment was made on the basis of bookings

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[16] 15 T.C. 374, 378.

[17] [1952] A.C. 280, 288.

"or on the basis of receipts." That does not expressly deal with the case where the sums remaining to be collected are of such a character that they could be regarded as annual payments.

Turning to the facts of the present case, it appears to me that the first question to be determined is whether these royalties were professional earnings assessable under Case II during Cheyney's lifetime; and the second question is whether, if they were professional earnings, they also had some other character by virtue of which they could be assessed to tax under some provision other than Case II either during his lifetime or later. There is no dispute about the first question. These royalties were in fact assessed under Case II in so far as they were payable during Cheyney's lifetime. It is not suggested that that was wrong, and I think it was clearly right. One way, and perhaps the commonest way, for an author to make money out of his profession is to make agreements with publishers under which he receives royalties. And it appears to me to be impossible to argue that, though an instalment of royalties payable the day before Cheyney died was part of his professional earnings, an instalment payable the day after his death was not. It might have some other character in addition, but it could not cease to be a part of his professional earnings.

The question, then, is whether these royalties had a dual character: whether in addition to being professional earnings they were of such a character that they could be assessed under some other Case than Case II. The assessments which the Crown seeks to support were simply made under Schedule D, and they would be valid if they could be justified under any Case of that Schedule. The Attorney-General expressly admitted that during Cheyney's lifetime they could not have been assessed under any Case other than Case II. In my opinion, that admission was properly made, and for this reason. A taxpayer carrying on a profession is entitled to set against his gross receipts all allowable expenses which he has incurred in earning those receipts: he can do that if assessed under Case II, but he could not do it otherwise. The appellant's case must therefore be that, although royalties payable before Cheyney's death could not be assessed under any Case other than Case II, royalties payable after his death can be so assessed.

It is quite possible for receipts to have such a dual character that the Crown can elect under which Case they shall be assessed. We were referred to some of the insurance company cases, where a large part of the receipts of the company consisted of dividends or interest from investments. Instead of assessing the company on the profits of its business under Case I the Crown is entitled to assess under Case III on the amount of the annual payments received by the company. But that right does not arise only after the company has ceased to carry on business. The nature of the payments received by the company is such as to bring them within the scope of Case III whether the company is carrying on business or not. But in the present case it is admitted that that is not so: the nature of these royalties is such that they cannot be assessed under any case other than Case II so long as the author is following his profession. But it is argued that they can be so assessed after the profession is discontinued. The nature of the royalties does not change on the death of the author; they are still payable under the same contracts, and, as I have said, they are still part of professional remuneration. But the circumstances are different because the profession has been discontinued. No further expenses allowable as deductions can be incurred, and assessment under Case II is no longer possible. Can this change of circumstances bring within the scope of Case III payments which had formerly not been within its scope?

That question arose in *Stainer's* case.[18] But, before I proceed to examine that case, it may be well to see what are the differences between the facts in the present case and the facts in that case. In both cases the payments in respect of which the executors were assessed were payments of royalties due under contracts made by the deceased which only became payable after the date of his death. In *Stainer's* case[18] they were royalties due to a producer of films: in this case they are royalties due to a writer of books. In both cases earlier payments under the same contracts made during the lifetime of the deceased were admittedly part of his professional earnings. In *Stainer's* case[18] the payments had been earned chiefly by Stainer, who was known professionally as Leslie Howard, giving his professional services as a producer and actor: there was also an element of copyright in the case, but I am prepared to regard *Stainer's* case[18] as simply a case of payment for professional services, the payment taking the form of royalties spread over a considerable period. In the present case there was an element of rendering professional services because some of the contracts were contracts under which Cheyney undertook to write books for publication by the publishers. But much stress was laid by the appellant on the contention that the contracts were really means adopted by

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[18] [1952] A.C. 280.

Cheyney for exploiting property which he had created, his copyright in books which he had written. Some of the contracts were of that character, and, if the appellant cannot succeed with regard to these contracts, he certainly cannot succeed with regard to the others. So I shall consider the present case on the footing most favourable to the appellant, i.e., that the sums assessed were instalments of fees payable under contracts obtained by Cheyney in exploiting his copyright in books written by him by licensing publishers to publish or translate them.

But I must add that, even so, there is an essential difference between that case and the case of a person who buys a copyright from the author and then proceeds to exploit it by granting licences to publishers. Where the author exploits his own copyright by granting licences to publishers the fees which he receives are admittedly part of his professional earnings, and are not taxable as annual payments under Case III, at least during his lifetime. But, where the author sells his copyright, the price which he receives is part of his professional earnings, and the fees which the purchaser gets from granting licences to publishers are from the beginning taxable as annual payments to him irrespective of whether the author is still practising his profession; they are no part of the author's professional earnings.

In *Stainer's* case [19] the majority of the Court of Appeal held that the payments due after Howard's death were taxable under Case III as annual payments. I think it useful to take some quotations from the judgments because they appear to me to assist in determining what was really decided in that case in this House. Evershed M.R. said [20]: "The question in each case "must be whether the sums in question, once they have ceased "to be capable of taxation under Case II by reason of the fact "that the professional man who acquired the right to receive "them has died or ceased to exercise his profession, nevertheless "have such characteristics as fairly bring them within the com"pass of the relevant words of Case III," and Somervell L.J. (as he then was) said [21]: "Accepting in favour of the executors "the commissioners' view that these sums, if paid, could not, "while Mr. Howard was exercising his profession, have been "assessed otherwise than under Case II because they were not "in his hands 'pure income profit' (see *Asher* v. *London Film* "*Productions Ltd.* [22]), it does not, in my opinion, follow that their

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[19] 32 T.C. 367.

[20] Ibid. 390.

[21] Ibid. 394.

[22] [1944] K.B. 133; 60 T.L.R. 115; [1944] 1 All E.R. 77.

"nature may not change if the profession has ceased before they "become payable and are paid." Jenkins L.J. dissented, and with regard to his judgment my noble and learned friend, Lord Simonds, said, with the concurrence of all noble Lords present[23]: "I am conscious that I can add little or nothing to the dissenting "judgment of Jenkins L.J. with every word of which I agree." I quote two passages from this judgment[24]: "It appears to me "that the argument for the Crown involves not merely the exercise of an option but the assertion of a new and distinct liability "to tax arising upon the discontinuance of the profession with "respect to payments on account of the shares of receipts or "profits received after such discontinuance. Perhaps the best "way of putting the point is to describe the shares of receipts or "profits as possessing the dual character of (*a*) professional "earnings and (*b*) annual payments, the argument being in effect "that so long as the profession was carried on their character as "earnings precluded their assessment as annual payments under "Case III of Schedule D, but that on the discontinuance of the "profession this obstacle was removed and the sums in question "became thenceforth simply annual payments to which the previously potential but suspended liability to tax under Case III "of Schedule D thereupon attached." Having dealt with *Bennett* v. *Ogston*,[25] he noted that the Solicitor-General had argued that the instalments were income earned by the exploitation of the films after Howard's death just as the interest in *Bennett* v. *Ogston*[25] was income earned after the moneylender's death by the use of the money lent in his lifetime. He then said, after dealing with the case of an income-bearing asset received as remuneration, a point to which I shall return later[26]: "I "think it is equally clear that the assessment to tax of the profits "of a profession under Case II of Schedule D down to the date "of discontinuance is to be taken as covering all remuneration "earned in the course of such profession whether received prior to "or after such discontinuance and that, the liability to tax being "thus exhausted so far as remuneration is concerned, nothing "which is in truth remuneration so earned can afterwards be "charged to tax merely because the mode of ascertaining and "paying it is such that it might have been charged to tax under "some other Case if it had not been remuneration so earned."

In this House my noble and learned friend Lord Simonds, after approving the principle stated by Rowlatt J. in *Bennett* v.

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[23] [1952] A.C. 280, 287.

[24] 32 T.C. 367, 402.

[25] 15 T.C. 374.

[26] 32 T.C. 367, 404.

Ogston,[27] expressed a doubt whether that principle was correctly applied in that case—a doubt which I share. He then said, with regard to the instalments [28]: " It appears to me wholly irrelevant " that they were not payable until after his death and equally so " that they were not and could not be quantified until after that " event. They retained the essential quality of being the fruit " of his professional activity. . . . The source of these payments " was the professional activity of Mr. Howard: it was never " anything else. It is true that his remuneration took the form " of annual payments which, if other conditions were satisfied, " might fall within Case III. But other conditions were not " satisfied, for ex hypothesi the source of the remuneration was " the exercise of a profession falling within Case II."

In my opinion, the ground of judgment in this House in *Stainer's* case [29] was that payments which are the fruit of professional activity are only taxable under Case II and cannot be taxed under Case III, even when it is no longer possible when they fall due to tax them under Case II, and when looked at by themselves and without regard to their source they would fall within Case III. I am not sure that I fully appreciate the reasons for the decision, but I have no doubt that that is what was decided, and I am bound by that decision whether I agree with it or not.

The basis on which the appellant seeks to distinguish *Stainer's* case [29] is, if I understood the argument rightly, that although payments under the agreements in this case had to be treated as falling within Case II and as excluded from Case III so long as Cheyney was alive, they were not truly the fruit of his professional activity but were truly the fruit of his exploitation of property. I did not understand the Attorney-General to argue that these payments changed their character when Cheyney died: his argument was that they never had been the fruit of professional activity. I must confess that I do not understand how a payment which is not truly the fruit of professional activity can fall within Case II at any time. Section 123 (1) of the Act provides: " Tax under Schedule D shall be charged " under the following cases respectively, that is to say—. . . Case " II—tax in respect of any profession or vocation not contained " in any other Schedule." I cannot see how " tax in respect of " any profession " can be chargeable in respect of a sum which is not the fruit of a professional activity but is the fruit of something

[27] 15 T.C. 374.

[28] [1952] A.C. 280, 289.

[29] [1952] A.C. 280.

else: it appears to me that, once it is established that these payments were properly chargeable under Case II, it necessarily follows that they must be regarded as the fruit of professional activity and, if that is so, this case appears to me to be indistinguishable from *Stainer's* case.[29]

Finally, I think that I ought to examine certain statements in *Stainer's* case [29] about income-bearing assets because the appellant relied on them. Jenkins L.J. said [30]: "I think it is clear "that if, in the course of a profession, an income-bearing asset "is received as remuneration, the income produced by that asset "after the discontinuance of the profession may be taxed as such, "just as the interest accruing after the death of the money-"lender was taxed in *Bennett* v. *Ogston*." [31] Lord Simonds said [32]: "I can well understand that if a professional man "receives as remuneration for his services the sum of £1,000 "2½ per cent. Consols and retains them, he will suffer deduction "of tax from the interest." And Lord Asquith said [33]: "If "Mr. Leslie Howard had stipulated for payment in blocks of "shares or bonds, or any other instruments which by their "independent vitality generate income, the dividends or interest "might well have been taxable in the hands of his executors." To my mind, if a person receives as part of his remuneration an asset which yields income, that income is not the fruit of his professional activity any more than it would be if that person had received his remuneration in money and had then used that money to buy that asset. From the moment when the asset comes into his hands, the source of any income which it yields is that asset and not his professional activities. There would be no question of the income falling under Case II during his life and then being taxable under some other Case after his death. The receipt by a professional man of income yielded by an asset which has been transferred to him is not a method of gaining professional income whether or not the asset came to him as professional remuneration. But for an author exploitation of his copyright is a method of gaining professional income. Therefore this matter is of no assistance to the appellant's case. I am of opinion that this appeal should be dismissed.

LORD TUCKER. My Lords, I agree for the reasons which have been stated that this case is indistinguishable from the decision of this House in *Stainer's Executors* v. *Purchase*[34] and that accordingly this appeal should be dismissed.

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[29] [1952] A.C. 280.
[30] 32 T.C. 367, 404.
[31] 15 T.C. 374.
[32] [1952] A.C. 280, 289.
[33] Ibid. 291.

LORD KEITH OF AVONHOLM. My Lords, in the view that I take of this case any differences in the specimen agreements produced are immaterial. All are agreements giving certain rights to publishers in respect of books written or to be written in return for remuneration by way of royalties (or sums in advance of royalties) on the books when published and sold. Three of the agreements may be regarded as agreements assigning to publishers, under certain conditions, the copyright in certain books written or to be written and the fourth as conferring rights of translation and publication in French of a book already published in English.

It is conceded that during his life Peter Cheyney was assessed to tax on the royalties obtained under these agreements, under Case II of Schedule D, as a person carrying on the profession of author. The question is whether royalties coming in after his death continue to attract tax. In *Stainer's* case[34] it was held that the remuneration accruing after death for services given during life as actor and producer did not attract tax, as the profession in respect of which the profits and gains were taxable had ceased at the death. The Court of Appeal, Harman J., and the General Commissioners have all taken the view that this case is governed by *Stainer's* case[34] and that the assessment should be discharged. But this case cannot, I think, be treated as a case of remuneration for services rendered. Some of the agreements relate to books already written and the others relate to rights to be conferred in books when they come to be written. An author is not, in my opinion, making a contract for services by entering into an agreement for the publication of a book already created by him. The position may approximate to a contract for services where the author binds himself to write a book and to transfer the copyright to a publisher, but I do not find in the agreements here any obligation to write a book. Cheyney's own interests were no doubt sufficient to secure that the book, or books, would be written. I prefer to treat the case from the angle of approach taken by the learned Attorney-General that these are agreements relating to property of Cheyney already in existence or to come into existence.

The case for the Revenue, as I understand it, is that the activities of Cheyney during his life had a dual character. They were the exercise of the profession of an author in writing books and they were at the same time a dealing with the property in the books so created. During his life, or until his retirement, it was the professional aspect of his activities with which the Revenue was concerned and in respect of which he was taxed. With his death this aspect of the matter terminated, or disappeared, and we are left, it is said, only with property in the shape of the books and copyrights created by him. These, so the argument runs, are income-producing assets, on the income from which tax should be levied as income of property. Thus during his life Cheyney was assessable under Case II of Schedule D, and on his death the royalties from the contracts made by him arising out of the publication of his books were taxable under Case III as annual payments or alternatively under Case VI, or, in the case of royalties accruing abroad, under Case V as income from possessions out of the United Kingdom. The learned Attorney-General expressly disclaimed any right of the Revenue to opt between Case II and Case III during Cheyney's life.

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[34] [1952] A.C. 280.

I have reached the view that the contentions for the Revenue fall to be rejected. But first I would emphasise that we are concerned only with contracts made by Cheyney. If there are any unexhausted rights in Cheyney's books which his representatives could turn to account after his death, quite different considerations would arise with which we are not concerned in this case.

I turn accordingly to consider what is involved in the professional activities of an author during his life. An author writes books generally for profit or in the hope of profit. It is only when they make a profit that any question of assessing him on the profits of a profession can arise. It is only by exploiting the work of his brain and his pen that he can make any professional income. The methods of exploitation may take various forms. He may arrange for publication of his works and retain the profits of sale, after deduction of publishers' and printers' and other expenses, for himself. He may sell the copyright of his works in return for lump sum payments, or for royalties on sales, or for both. He may grant use of his works for translation, for film or stage production purposes, for broadcasting or in other ways. He may accept commissions to produce books on agreed terms. Cheyney seems to have adopted all these methods, except possibly the first, according to the specimen agreements put before us. In my opinion, whichever of these methods an author adopts he is doing no more than pursuing his profession with a view to pecuniary profit. It would be absurd to treat his professional activities as at an end with the production of his typescript, or manuscript, and to treat the rest as merely turning property to gain. An author, unlike an artist, necessarily looks to large-scale reproduction of his book and the greater the number of copies sold the greater will be his income if he has retained the rights in his work in his own hands or has sold them on a royalty basis. He may, of course, sell the rights for a lump sum, and history records many instances of an author having thus disposed of the fruits of his labour for a very inadequate sum. In this last example the sum received will be a receipt of his profession in respect of which he will be taxable. Equally he will be taxable on receipts in the shape of royalties received, or on the profits of publication where he has retained his rights in the book. It is impossible, in my opinion, to treat these receipts differently for income tax purposes according to the form which they take. They are stamped throughout as the receipts from a professional activity and they do not lose that character on the death of their producer.

In principle there is no difference between the case where an author sells the copyright and the case where he retains the copyright. What he has produced is not copyright but a book. Copyright is an incident attached by law to the book, fortifying that which he has produced and giving it a value which it would not have if it could be reproduced illegitimately in the shape of pirated editions. The property, then, from which the author obtains his income is the work produced by him and the method by which that work can be turned to profit during his life is in his own hands and is but a projection of his professional activities, the means by which he earns his livelihood from his professional work. If I take the case where he retains the rights in his work and takes the profits to himself, it seems to me clear that when he dies any profits that come in afterwards from any issue published during his life are still the profits of what was his profession. It is not possible to say that they are mere income of property, "pure income profit" as it has been called. They are profits not only from writing the book but from bearing all the expenses of selling the book to the public, including the expenses of printing and publishing. They are akin to the profits of a trade but are more properly called the profits of a profession. So it is, in my opinion, where he sells his rights in return for royalties. It is quite unreal to regard these royalties merely as a return from property. They are the reward for all he has put into his work—his labour, his thought, his skill as a writer—and the expenses incurred in creating his book. The position is materially different where rights in a book in return for royalties are granted by another than the author. The elements to which I have referred are entirely absent in such a case. The book is there already made and the idea of royalties as merely the income of property is a more intelligible conception. In Cheyney's case the position is, in my opinion, accurately and concisely summed up in the words of Jenkins L.J. when he says[35]: "It "was just as much part of his profession to turn his literary "labours to account by licensing the copyright he had created to "publishers as it was to write the books in which the copyright "subsisted." He was treated by the Revenue as earning money in the exercise of his profession by means of the contracts he made. It is not now said, nor could it, in my opinion, be said, that any change in the character of the payments received took place on his death. What is said is that what was latent became patent when his professional activities ceased on his death. But for the reasons I have given there is, in my opinion, no sound ground for this contention.

The difficulties in this and similar cases arise from the fact that assessments to tax are made on a receipts basis, instead of on an earnings basis. It may be that in some professions no more satisfactory basis can be adopted. If the result be, as was suggested, that a large fund of income is thus to go untaxed the remedy would seem to lie in legislation. This is not a *Stainer* case,[36] but the principle of that case, I think, applies.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Frere, Cholmeley & Nicholsons.*

F. C.

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[35] [1958] Ch. 345, 372.

[36] [1952] A.C. 280.

J. C.*

1959
April 7.

BEATRICE ALEXANDRA VICTORIA DAVIES . . . APPELLANT;

AND

PERPETUAL TRUSTEE COMPANY (LIMITED) AND OTHERS . . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Charity—Public—Section of community—Religion—Property devised to "Presbyterians the descendants of those settled in the Colony "hailing from or born in the North of Ireland"—In trust to establish "college for the education . . . of their youth" in specified religious standards—Not a valid charitable devise—Beneficiaries a fluctuating body of private individuals—Element of public benefit lacking.

Charity—Religion.

Australia (New South Wales).

*Privy Council—Leave to appeal—Special leave—Whether gift falling into possession charitable—*40 *years after judgment.*

A testator, who died on January 21, 1897, by his will made in 1894, gave successive life interests to his widow and certain of his nephews in "Block 70B on which stands Ultimo House" in Sydney, New South Wales, and by a codicil of 1895 gave the property on the termination of the life interests "to the Presbyterians the "descendants of those settled in the Colony hailing from or born "in the North of Ireland to be held in trust for the purpose of "establishing a college for the education and tuition of their youth "in the standards of the Westminster Divines as taught in the "Holy Scriptures." On an originating summons issued in 1918 by the then sole trustee for the determination of certain questions it was held, inter alia, by the trial judge and, on appeal, by the Full Court of the Supreme Court of New South Wales, that the above devise was a good charitable trust for the purposes mentioned in the codicil. The last of the life tenants interested in Block 70B died in 1957, and thereupon—nearly 40 years after the decision of the courts in Australia—special leave was given to the appellant, as representing the next-of-kin, to appeal against the decision of the Full Court of the Supreme Court:—

Held, that, although the object of the testator's bounty was, prima facie, a charitable object within the classification in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* [1891] A.C. 531, 583; 7 T.L.R. 657, the qualifications for eligibility for education at the proposed college had the result of making beneficiaries under the trust nothing more than "a fluctuating body of "private individuals," and the gift failed because the necessary element of public benefit was lacking.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD COHEN, LORD SOMERVELL OF HARROW and LORD DENNING.

J. C.
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Co.

Dicta in *Verge* v. *Somerville* [1924] A.C. 496, 499; 40 T.L.R. 279 and *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297, 305, 306, 309; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31 applied.

In re Tree [1945] Ch. 325; 61 T.L.R. 383; [1945] 2 All E.R. 65 distinguished.

Judgment of the Supreme Court of New South Wales reversed.

Appeal (No. 26 of 1958), by special leave, from a judgment of the Full Court of the Supreme Court of New South Wales (Pring and Gordon JJ. and Langer Owen Ag.-J.) (June 14, 1919) and the decretal order thereon (September 26, 1919) upholding a decision of Harvey J., a judge of that court sitting in Equity (December 20, 1918).

The following facts are taken from the judgment of the Judicial Committee: The only question arising for decision on this appeal was whether a devise contained in a codicil to the will of George Harris was or was not a valid charitable devise. The parties were in agreement that the devise was invalid unless it could be upheld as being charitable. It was in the following terms: "I give and "devise Block Seventy B upon which stands Ultimo House to "the Presbyterians the descendants of those settled in the Colony "hailing from or born in the North of Ireland to be held in trust "for the purpose of establishing a college for the education and "tuition of their youth in the standards of the Westminster "Divines as taught in the Holy Scriptures."

The testator lived at Ultimo, Sydney, New South Wales, and died on January 21, 1897. By his will dated April 18, 1894, the testator devised Block 70B to his wife for her life, and thereafter to his nephew, John Harris, for life, and thereafter to the next surviving eldest son of his brother John for life until the death of the last survivor of his nephews, the sons of his brother John, and then to his heir-at-law bearing the name of Harris. By the said codicil, which was dated April 3, 1895, the testator revoked the ultimate devise to his heir-at-law and substituted the devise already set out. He also revoked several provisions of his will as to the destination of the ultimate residue of his estate, and gave that residue to the college to be founded pursuant to the said devise, directing that it be "held at interest and this latter added "to the income annually."

The last of the life tenants interested in Block 70B died on April 19, 1957. At that date Block 70B, which had been resumed by the Government of the State of New South Wales, was represented by investments representing the proceeds of sale thereof worth approximately £53,000, and the value of the residue was £286,750.

On October 26, 1918, one John Harris, who was then the sole trustee of the will, issued an originating summons in the Supreme Court of New South Wales in Equity, for the determination of a number of questions. Question 10 (a) asked whether the devise of Block 70B (and another devise not material for the present purposes) were valid devises. At the hearing of the originating summons by Harvey J., counsel for certain of the defendants (who were among the next-of-kin of the testator), and counsel for the University of Sydney submitted that the devise in question was void for uncertainty and was not charitable as it was confined to a restricted class. Those submissions were replied to by counsel for the Attorney-General. After the Attorney-General's address, the judge made the following note, on December 18, 1918: " Subject to affidavit by Attorney-General as to Presbyterian " children, I answer 10 (a) in affirmative as being a vested " remainder for a good charitable object."

Next day an affidavit was sworn by one William Wood, and it appeared from the judge's further note that that affidavit was put in evidence before him. The deponent stated that he was the financial secretary of the Presbyterian Church of Australia in the State of New South Wales, that he had occupied that position for over 25 years, and that he had an intimate knowledge of the affairs and constitution of the Presbyterian Church in that State. He then deposed to the fact that " amongst the members of the " Presbyterian Church in this State in the year 1897 there were " numerous persons descendants of Presbyterian settlers in this " State, and hailing from or born in the North of Ireland, and " at the present time there are still a considerable number of " adherents or members of the said Church similarly descended." That was the only evidence before the judge as to the existence or otherwise of persons of the class required by that devise, and he was apparently of the opinion that it satisfied the condition which he had imposed when answering question 10 (a) in the affirmative.

In his formal judgment delivered on December 20, 1918, Harvey J. said: " I have already held that the effect of the codicil " is to revoke both devises in the will in favour of the testator's " heir-at-law, but that the life interest in Ultimo House in favour " of his widow and nephews, and the life interest in the residuary " real estate in favour of his nephews are not disturbed by the "codicil. I have also held that the trust for founding a Presbyterian college is a good charitable trust, being an immediately "vested remainder waiting only for the determination of the "antecedent life estates of the sons of John Harris. When this "remainder falls in it will become necessary to settle a scheme "for the administration of this trust."

That decision was upheld on appeal by the Full Court of the Supreme Court of New South Wales. In delivering the judgment of that court, Langer Owen Ag.-J. said, with reference to the devise now in question: "Harvey J. held that it amounted to a "trust for founding a Presbyterian college, and it is a good charitable trust for the purposes mentioned in the codicil, and we "agree with him. We think that it should be construed as a "devise for the benefit of Presbyterians descended from those "settled in New South Wales hailing from or born in the North "of Ireland to be held by trustees for the purpose of establishing "a college for the education of their youth according to certain "religious standards. It is not a devise to or for the Presbyterian "Church of Australia as constituted by the Presbyterian Church "of Australia Act, 1900. It is a devise for the benefit of certain "individuals who are Presbyterians, and who come within a "certain description, and the object is to afford facilities for "religious education. It may be that, when the time arrives for "carrying this charitable trust into effect, it may be found "impracticable to do so. In that event there is nothing in our "decision, and there should be no expression inserted in the "decree, to prevent the beneficiaries under the will and codicil "from contending that the cy-près doctrine is not applicable to "these devises."

The decree of the Full Court, so far as material, stated that the devises of Block 70B (and of another property not material for the present purpose) were valid charitable devises for the respective purposes contained in the codicil, and continued "but this "declaration is without prejudice to the right of the beneficiaries "or any of them under the said will to contend that the cy-près "doctrine is not applicable to these devises or either of them if "the said purposes are incapable of taking effect when the respective funds become available for the said purposes. The said "devise of Block 70B in the said codicil is subject to the prior "life estates therein given by the said will in favour of the widow "and certain nephews of the testator the sons of his brother John."

After the death of the last of the life tenants interested in Block 70B, on April 19, 1957, special leave to appeal was granted to the present appellant, as representing the testator's next-of-kin. So it was that this appeal came before their Lordships' Board nearly 40 years after the decision of the courts in Australia.

1959. February 5, 9, 10, 11. *K. S. Jacobs Q.C.* and *D. E. Horton* (both of Australia) for the appellant. The specific devise in the codicil is invalid and no valid charitable trust is created. It is submitted, first, that there is not and never has been an identifiable and recognisable public class in New South Wales consisting of the youth of Presbyterians the descendants of immigrants from the North of Ireland. The devise was for the benefit of certain individuals. All that is indicated is a private purpose, and any class, to be a good public class for charitable purposes, must have a public quality—a recognisable public quality. The descendants of immigrants lose the public character which separates them as a class. The authorities show (i) that numbers are not sufficient, and (ii) that to be a public class the class must be relevant to the purpose. In *Laverty* v. *Laverty* [1] the gift was held not to be charitable on two grounds: (1) it was to individuals and there was no public element; and (2) there could be a severance of education from support. That case was relied on in *In re Compton* [2] and is used to support the first submission—that where one finds a limitation by descent, unless some further element can be discovered which would make the descent public, then there is clearly a private class of individuals. In *Compton's* case [2] the distinction was between a class of the community and persons who had to establish their membership of a group by tracing their descent from individuals. No class is appreciably important in the community unless it is recognisable as a class by some characteristic of public importance. Here the qualification is one which qualifies the personal characteristics of the individual to benefit. The above-stated principles appear from *Compton's* case [2] and were affirmed in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*,[3] where it was held that there was no nexus of a public character—that is the test. See also *In re Hobourn Aero Components Ltd.'s Air Raid Distress Fund.*[4] There is, on the principle of those cases and in the nature of this trust, no nexus of a public character.

Secondly, even assuming that for certain purposes and in certain ways the youth of the descendants of immigrants from the North of Ireland might be regarded as a class of the community, it is still submitted that there was no valid trust in this case, and that the particular object expressed in this trust is not a valid charitable purpose, because of the lack of the relevant relation between the establishment of a college for educational purposes and the tuition of youth in particular, and the limitation of the right to attend the college to those who happen to be children of descendants of settlors in New South Wales from the North of Ireland. The discrimination is an irrelevant one. Such a concept of segregation is not permissible in the law of charity with its requirement of a public element; the place of origin of the ancestors is irrelevant to a youth's education and to his religious training. Where there is an irrelevant consideration in the selection of the class, then the element of public benefit which would be presumed in the case of a trust for religious purposes or other public benefit is displaced. The result of the additional qualification of immigration is to cause persons who possess that qualification to be unable to be regarded as an essential community for the charitable purposes indicated. If there is to be a charitable purpose, then it must be by a man who directs his mind to the public purpose; there must be a direction for the purpose of the class, and therefore the relevant relationship is between that class and the purpose.

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[1] [1907] 1 I.R.Ch. 9.

[2] [1945] Ch. 123, 135; 61 T.L.R. 167; [1945] 1 All E.R. 198.

[3] [1951] A.C. 297, 305; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

[4] [1946] Ch. 194, 200, 207; 62 T.L.R. 313; [1946] 1 All E.R. 501.

The purpose must be a public purpose in the full sense—that is, the testator must make the benefits which he intends to create available to all capable of enjoying them. He could, it is conceded, limit it geographically. The greatest particularity in which this purpose could be expressed as a charitable public purpose would be the establishment of a college for the education and tuition of the youth of Presbyterians in the standards of the Westminster Divines as taught in the Holy Scriptures. It is not permissible, however, to introduce into the purpose which is found to be within the spirit and intendment a further qualification—the youth of descendants settled within the colony—because that is to create a class within a class.

Inland Revenue Commissioners v. *Baddeley*[5] is relied on for the principle that the class must be related to the purpose, and for the principle that it is not possible to consider the class apart from the particular nature of the charitable purpose. That is a principle which is correctly stated of all charitable purposes, and is not one which has a peculiar application to trusts in the fourth

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[5] [1955] A.C. 572, 589; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525.

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category enumerated in *Commissioners for Special Purposes of Income Tax* v. *Pemsel.*[6] It is not a charitable purpose to educate the children of employees of a particular company. Such a limitation cannot be introduced into the purpose. There is no public element in it once it is limited to settlors as at a certain date—the death of the testator. It is necessary for there to be a public justification for limiting the education and tuition to a class consisting only of the youth of descendants from a particular place. The descendants of such immigrants do not form a class in the community for such a purpose. *Attorney-General* v. *Stewart*[7] is an example of what is conceded to be a relevant limitation, because there there was a special need different from the ordinary persons in the community. *Williams' Trustees* v. *Inland Revenue Commissioners*[8] is again a case on the fourth class, and reliance is placed on the principle there stated that one cannot extract from cases like *Goodman* v. *Mayor of Saltash*[9] some separate principle relating to classes in the community being sufficient for any purpose. In *Williams'* case[10] in the Court of Appeal it was held that they were not an identifiable class in the community. In the present case there is the same type of vagueness. The disjunctiveness of the words "hailing "from or born in the North of Ireland" would, it is submitted, result in the inclusion of persons not necessarily Northern Irelanders in the strict sense at all, for "hailing from" would mean that they embarked from Northern Ireland. In *In re Tree*[11] the judge came to the conclusion that there was a class of the public, but without considering whether or not the class was relevant to the purpose in any way. What is being submitted in the present case does not cut across any of the established types of charity. Unless one can find the identifiable class from the words of the will, one is left with an aggregate of individuals. [*Goodman's* case[12] was referred to.]

The third submission really follows not as a precisely separate point. It is that there is no public benefit because the trust is for the establishment of a college for the tuition of a very limited class in a particular religious doctrine with no suggestion of the dissemination of that doctrine beyond this very limited class. That is not a valid charitable trust. It could not be supported either on education or religious tuition. There has to be in every charitable trust this additional element of its propagation or spread beyond the limited members: *Gilmour* v. *Coats.*[13] It is not sufficient in the present case for the Attorney-General to argue that here is a charitable purpose and here is a class. In *Hoare* v. *Hoare* [14] Chitty J. held that none of the purposes was charitable and the trusts were held to be invalid.

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[6] [1891] A.C. 531, 583; 7 T.L.R. 657.

[7] (1872) L.R. 14 Eq. 17.

[8] [1947] A.C. 447, 459; 63 T.L.R. 352; [1947] 1 All E.R. 513.

[9] (1882) 7 App.Cas. 633.

[10] [1945] 2 All E.R. 235, 240–242; 173 L.T. 221.

[11] [1945] Ch. 325, 328, 332; 61 T.L.R. 383; [1945] 2 All E.R. 65.

[12] 7 App.Cas. 633.

The fourth and last submission is that there is uncertainty in the expression of the purpose and the trust fails because of that uncertainty. It cannot be ascertained with certainty precisely what was the intention of the testator in his reference to "Pres-"byterians" in particular, and also in reference to the word "those." One cannot say that a trust is charitable until, applying the ordinary rules of construction, the precise meaning of the disposition is ascertained: *In re Cox, decd., Baker* v. *National Trust Co. Ltd.*[15] It cannot be charitable unless in the first instance it is certain. The uncertainty which arises from the word "Presbyterian" is that (i) it may mean a member of a particular church; (ii) a member of any church with a Presbyterian form of government; (iii) a member of any church which calls itself Presbyterian; (iv) a member of any church which not only calls itself Presbyterian but also has a Presbyterian form of government. And it may well be that a believer in the doctrines, even though not a member of the church, would be entitled to be called a Presbyterian. In addition to those matters, the uncertainty goes further, namely, whether the member or believer must or must not subscribe to or believe particular articles of faith in addition to matters concerning church government.

General Assembly of Free Church of Scotland v. *Lord Overtoun* [16] contains much of the early history of Presbyterianism in Scotland. On the question of evidence or judicial notice, schisms, etc., are matters of which the court takes judicial notice. For the definition of "Presbyterianism," see the Shorter Oxford English Dictionary, 1933 ed. [Reference was also made to the Encyclopaedia Britannica, 11th ed., vol. 22, p. 283, and to *In re Allen.*[17]] The testator could have meant either the Presbyterian Church of New South Wales or the Presbyterian Church of Eastern Australia. At an earlier date, that is, if the settlors had to be Presbyterians themselves, there were a number of different Presbyterian Churches in New South Wales, and the history of that church appears in the Australian Encyclopaedia (1957), vol. 7, pp. 262, 264, 268. The litigation referred to in that volume is *Lang* v. *Purves*.[18] The other litigation mentioned on p. 264 is *MacPherson* v. *Sutherland*.[19] On the facts, and also owing to the general nature of the colony, there would be many persons who were settled and could not be presumed to have been on the roll of any particular church. The testator could not have meant by " Presbyterian " a member on the roll of a church in New South Wales; the circumstances in the colony would preclude such an interpretation.

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[13] [1949] A.C. 426, 448; 65 T.L.R. 234; [1949] 1 All E.R. 848.

[14] (1886) 56 L.T. 147.

[15] [1955] A.C. 627; [1955] 3 W.L.R. 42; [1955] 2 All E.R. 550.

[16] [1904] A.C. 515; 20 T.L.R. 730.

[17] [1953] Ch. 810, 817; [1953] 3 W.L.R. 637; [1953] 2 All E.R. 898.

It was held in *Dill* v. *Watson* [20] that the principles observed at the time of the creation of the trust were the relevant principles. In that case the question had to be asked, what is Presbyterianism? and the answer was, one cannot say what Presbyterianism in general is; all we are concerned with in this case (*Dill's* case) is, what was the particular religious doctrine observed at the time when the trust property was settled. The application of *Dill's* case [20] is that a court is not able to say what is the fundamental test of what is a Presbyterian. The court is quite uncertain where to place the emphasis; the word is thus uncertain, and one cannot say what the testator meant by it. As to uncertainty, it was held in *Attorney-General* v. *Bunce* [21] that what the testator meant was the particular congregation whatever the faith was at the time. *Attorney-General* v. *Murdoch* [22] is referred to merely to show that there were other branches of Presbyterianism even in England at that time. In *In re Gott* [23] none of the cases cited in the judgment go to the question of uncertainty of meaning; it is uncertainty of who are to be the particular beneficiaries. [Reference was also made to *Flint* v. *Warren* [24] and *In re Tacon*.[25]] As to cases where words related to parentage and faith by reference to religion have been held to be uncertain, see in particular *Clayton* v. *Ramsden*,[26] which was applied to a condition precedent in *In re Wolffe*.[27] The condition was held void for uncertainty in *In re Blaiberg*.[28]

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[18] (1856) 2 Legge 955; (1862) 15 Moo.P.C. 389.

[19] (1885) 6 N.S.W.R.Eq. 114.

[20] (1836) 2 Jones' Exch.(Ir.) 48.

[21] (1867) L.R. 6 Eq. 563, 571–572.

[22] (1849) 7 Hare 445, 447.

[23] [1944] Ch. 193; 60 T.L.R. 214; [1944] 1 All E.R. 293.

[24] (1847) 15 Simons 626.

[25] [1958] Ch. 447; [1958] 2 W.L.R. 66; [1958] 1 All E.R. 163.

[26] [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16.

[27] [1953] 1 W.L.R. 1211; [1953] 2 All E.R. 697.

[28] [1940] Ch. 385, 389, 391; 56 T.L.R. 487; [1940] 1 All E.R. 632.

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Gordon Wallace Q.C., *Russell W. Fox* (both of Australia) and *J. G. Le Quesne* for the respondent, the Attorney-General for New South Wales. This gift is clearly devoted to charity—to educate along religious lines the youth of Presbyterians—and it is not in point if there be a measure of uncertainty in the method of selecting the class of beneficiaries, or in the object. It is beyond dispute that once a gift is devoted to charity it cannot fail for uncertainty. But the issue appears to be, what is meant by uncertainty in that setting? Once the position arises that a certain legal charitable intention appears, and assuming that that is the correct position here, then the residual legitimate inquiries are: has the gift been made in favour of an appropriate section of the community?—whether an important section matters not—and then, which is the ultimate step, is there a sufficient element of public benefit? The bare weight of numbers cannot convert what is essentially a private or domestic trust into a public charity. On the other hand, given that the trust is essentially not a private one, then numbers is an element legitimately to be considered.

In re Cox [29] does not assist the appellant, who cannot use it for the proposition that a trust which is certainly charitable can fail for uncertainty of object. The proposition that once a trust is charitable it cannot fail for uncertainty is variously stated in the textbooks: Tudor on Charities, 5th ed., pp. 63, 129–131; Halsbury's Laws of England, 3rd ed., vol. 4, p. 275, para. 573; Theobald on Wills, 11th ed., pp. 350–351. In *Baddeley* v. *Inland Revenue Commissioners* [30] Jenkins L.J. said: "Again, "trusts for the advancement of religion are commonly confined "to members of some particular religious sect or denomination, "but have never been held on that account to lack the necessary "element of public benefit. If the members of a particular "religious sect or denomination resident in a particular area are a "section of the public for the purposes of educational or religious "charities, I fail to see why they should not also be such for the "purposes of any other form of charity." [*Armenian General Benevolent Union* v. *Union Trustee Co. of Australia Ltd.*[31] and *In re Parker, decd.*[32] were also referred to.]

When it is said that a charitable trust does not fail for uncertainty, what is being said is that if one finds that the charitable intent falls within classes 1, 2 and 3 of the categories, then there is a certain charitable trust. Once that stage is reached, then the trust cannot be destroyed by subsequent uncertainty. Even the question of public benefit, especially if one confines oneself to classes 2 and 3, loses its importance once there is a certain charitable intent. If there be some limitation which is either meaningless or capable of two or more constructions, then one either ignores the meaningless limitation so as to keep the trust alive, or one gives it such a construction as will give substance to the charitable intention. If there be some obscurity in the limitation to the beneficiaries, the obscurity can be ignored: *In re Macduff.*[33] Assuming that there were three possible constructions of the word "Presbyterian" yielding three different sections of the community, and one was not able to tell which the testator meant, but each of the three sections provided a sufficient element of charitableness, then one could not say that the gift failed for uncertainty. Further, if there were two constructions, one that gave a large number and the other a small number, once there is a certain charitable intention the court would not be astute to say that the gift is bad because it might be to the small number. *In re Gott*[34] is right in principle. See also *In re White.*[35]

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[29] [1955] A.C. 627.

[30] [1953] Ch. 504, 540; [1953] 2 All E.R. 233.

[31] (1952) 87 C.L.R. 597, 604, 614.

[32] [1949] V.L.R. 133, 136.

One thing is clear with regard to "Presbyterians"—the testator was referring to the Presbyterian Church of New South Wales as it stood and existed in 1897. "Presbyterians" include members and adherents who are not technically members of the Presbyterian Church of New South Wales; alternatively, members or adherents of any Presbyterian church in Australia. The beneficiaries are the youth of Presbyterians, without qualification of residence or place of birth, who are themselves descendants of people who came to New South Wales from the North of Ireland. The position in the Presbyterian world of Sydney was not so confused as Mr. Jacobs would have the Board think—there was none of the uncertainty he stated: see the Presbyterian Church Act, 1865, the Presbyterian Church Property Management Act, 1881, and the Presbyterian Church Property Management Amendment Act, 1894. Everybody, it is submitted, accepted the position that "Presbyterians" meant members or adherents. As to the Act of 1865, it is obvious that by May 12, 1865, three separate types of Presbyterian Churches had been united and there was now one church—the Presbyterian Church of New South Wales, with a governing General Assembly.

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[33] [1896] 2 Ch. 451, 469; 12 T.L.R. 452.

[34] [1944] Ch. 193, 196 et seq.

[35] [1893] 2 Ch. 41, 52–53; 9 T.L.R. 261.

With regard to "hailing from or born in the North of Ireland," the gift is to the youth of Presbyterians; that is what the testator meant, and all this about North Ireland are inessential limitations. It is not unusual for inessential limitations to be ignored if they create difficulties in charitable trusts. The testator wanted to benefit Presbyterian youth in perpetuity—generation after generation. It is impossible to say that there is no public benefit about that; it is impossible to say that the class is too limited. There is authority for the view that the mere fact that one can define and identify members of the class or section of the community does not vitiate the gift. In the ultimate analysis the question is whether, other factors being present, a sufficient degree of public benefit has been demonstrated having regard always, of course, to the class within which the gift falls. Where there is a certain charitable intent, it cannot fail for uncertainty of object; one has first to decide whether the purpose is within the spirit and intendment of one of the categories; uncertainty cannot be used to prevent the next inquiry, which is whether sufficient public benefit is disclosed. In the present case, if on any view of uncertainty it is a class of an appreciable nature, who are not bound by some personal ties, then the uncertainty, if it exists, does not matter.

As to public benefit and the question of numbers, it is a reasonable implication that the youth of New South Wales increased since 1897. On the second limb of public benefit, namely, whether the nexus or common bond is impersonal, it is submitted that the gift is not, as was said for the appellant, to descendants of identified or identifiable individuals: *In re Compton.*[36] If it be sufficiently public and the common bond be not a personal one, the inquiry as to public benefit ends there, unless the doctrine put forward for the appellant of relative relationship between a limited class and a limited purpose is sound. There appears to be no authority for the way in which that was put. *In re Tree* [37] is rather strongly in the respondents' favour up to a point; the appellant said that it was wrongly decided. Passages in it are, it is submitted, persuasive and in line with authority. In the present case if there is a good gift to a section of the community it cannot be bad if it is to the descendants of that section. All that has happened here is that the propositus has made provision for a large class which is not named as individuals, and which is a section only because they descended from inhabitants of the North of Ireland who emigrated to Australia. Those things do not invalidate the gift. *Perpetual Trustee Co.* (*Ltd.*) v. *Ferguson* [38] was correct on its facts and is another illustration of the type of bond which does not disqualify.

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[36] [1945] Ch. 123, 129.

[37] [1945] Ch. 325, 330.

Apart from *In re Gott*,[39] it is submitted that uncertainty, if there be any, does not arise for consideration until the element of public benefit arises for consideration. On the facts of this case there is no uncertainty. On its true construction this gift does contain a general charitable intention: *Attorney-General* (*N.S.W.*) v. *Perpetual Trustee Co.* (*Ltd.*).[40] That completes the submission in answer to the fourth point made for the appellant.

The appellant's third point was that here there is no public benefit because the college is to teach a very limited class in a particular doctrine, with no element of dissemination: *Gilmour* v. *Coats*.[41] It is submitted that the appellant is wrong on that. The first and second points for the appellant were: (1) no identifiable public class, a mere aggregate of persons, no public element in the class; (2) no relevant relation between the beneficiaries and the purpose. As to the second of those points, the principle enunciated does not seem to appear in any textbook or in any authority. It is a sort of circular submission—because the submission is that there must be a relevant relation between the limited class and the limited purpose, but the limited purpose ex hypothesi is to benefit the limited class. It all boils down to, is the description or limitation of the class a limitation which takes the class out of the section of the public for charitable purposes? If the class is a true lawful section of the community, that is all that is needed. The nexus or relationship is one of the aspects which has to be considered in determining whether it is a sufficient section. One can only deal with what is a necessary section in broad terms. The gift does not necessarily mean that they are the only ones to go to this college; it may be open to the construction that it was not exclusively for those people. But, apart from that, there is here a substantial section of the community not singled out by a personal bond and a gift obviously for a charitable purpose. It is a question of degree.

Jacobs Q.C. in reply. This case comes down to two very simple matters: (1) If one can see no relevant reason why the particular limitation was introduced, then one is thrown back to the conclusion that the reason is not a public one, and that the aggregate of persons is not a section chosen by public qualification. That is the principle. One has merely to look at the terms of the document and any relevant evidence and the circumstances at the time and ask, What was the public purpose of limiting this class to 1897? The answer is that there is no public purpose. Motive is irrelevant; purpose is all to which one can have regard. (2) Is there a public justification for the limitation of the benefit to the youth of descendants of settlers from the North of Ireland? There is no public reason. Those general submissions are based on the application of established principles: there is nothing in *Perpetual Trustee Co. (Ltd.)* v. *Ferguson*[42] which goes contrary to them.

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[38] (1951) 51 N.S.W.S.R. 256, 260, 262.

[39] [1944] Ch. 193.

[40] (1940) 63 C.L.R. 209, 223.

[41] [1949] A.C. 426.

This should be declared not to be a good charitable trust. [*Taylor* v. *Taylor*[43] was referred to.] The matter had to come before the Board in any event so that it could be cleared up as regards the form of the order of the court below: *In re Wright, Blizard* v. *Lockhart*[44]; *Fisher* v. *Jackson*.[45] The respondents cannot get any comfort from *In re Tree*.[46] With regard to uncertainty, the type of uncertainty the appellant propounds is an initial uncertainty of meaning: *In re Gott*.[47] The word "Presbyterian" has not been able to be construed because one does not know where to start from. The definition in the New Oxford Dictionary gives the initial uncertainty which runs through the cases.

The three Acts which were referred to were concerned with machinery matters dealing with the union of Presbyterian Churches. They did not purport to deal with the Presbyterian Church, as it were, in New South Wales, using Church in the sense of all Presbyterians. Further, the Acts show that they only mean to deal with a particular Presbyterian Church: they are private Acts. [*MacPherson* v. *Sutherland*[48] was referred to.] One cannot say with certainty that the testator meant only members of the Presbyterian Church of New South Wales. If there is a particular charitable intention and one cannot ascertain what that particular intention is, the gift can fail: *Attorney-General* v. *Powell*.[49] The textbooks referred to do not assist the respondents. The *Armenian* case[50] applied the wider meaning of uncertainty.

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[42] 51 N.S.W.S.R. 256.

[43] (1910) 10 C.L.R. 218.

[44] [1954] Ch. 347; [1954] 2 W.L.R. 972; [1954] 2 All E.R. 98.

[45] [1891] 2 Ch. 84, 96.

[46] [1945] Ch. 325.

[47] [1944] Ch. 193.

[48] 6 N.S.W.R.Eq. 114.

[49] (1890) 11 N.S.W.R.Eq. 263.

[50] 87 C.L.R. 597.

April 7. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON, who stated the facts set out above and continued: The main contentions of Mr. Jacobs for the appellant were, first, that the element of "public benefit" was lacking in the trust created by the codicil, and secondly, that the gift was void for uncertainty as to the persons for whose benefit the trust was created, the uncertainty arising from the meaning of the words "the Presbyterians," coupled with the words "those" and "their youth."

Their Lordships now turn to considering the construction of the gift in the codicil. It is a gift to a body of trustees described as "the Presbyterians the descendants of those settled "in the Colony hailing from or born in the North of Ireland." For reasons which will later appear, their Lordships will assume, without so deciding, that the words "the Presbyterians" in this context can be given a definite meaning. As the codicil speaks from the testator's death it is plain that the class of "Presbyterians" must be ascertained as at January 21, 1897, but it is not every Presbyterian living at that date who is selected as a trustee. A Presbyterian to qualify must be a descendant of Presbyterians—the word "Presbyterians" must clearly be implied after the word "those"—settled in the Colony and either hailing from or born in the North of Ireland. The phrase "hailing from" is not very explicit, but may be taken to refer to persons who were resident in the North of Ireland at the time when they embarked for New South Wales.

The persons to be educated at the college are limited to "their youth"; that is, as their Lordships interpret the words, the children and remoter issue of the persons to whom as trustees the gift is made. Thus, the class of persons eligible to attend the college is defined simply by relationship to one or more of a number of persons living on January 21, 1897. A boy would only be eligible if (i) he was descended from a Presbyterian living at that date, and (ii) that Presbyterian was himself descended from a Presbyterian who had settled in the Colony, and (iii) that settler either hailed from or was born in the North of Ireland.

Curious results follow if it be imagined that the college is founded in 1959, and it has to be ascertained whether particular boys belong to the class of "their youth." Boy "A" is the son of members of a Presbyterian Church, but neither of his parents was living in 1897 and his ancestors then living were not Presbyterians. Boy "B" is the son and grandson of Presbyterians, but his Presbyterian ancestors living in 1897 were not descended from Presbyterian settlers, but themselves adopted Presbyterianism. Boy " C " is a descendant of Presbyterians living in 1897 and these Prebyterians were descended from Presbyterian settlers, but the Presbyterian settlers came from England or Scotland. No one of the three boys in question is within the class of beneficiary defined by the settler. Boy " D's " parents have no religion at all, but he has one grandparent who was living in 1897, was then a Presbyterian, and was descended from Presbyterian settlers who " hailed " from Northern Ireland. He is within the class of beneficiaries.

The law relating to charitable trusts must now be applied to these facts. In the course of his argument on behalf of charity, Mr. Wallace, for the Attorney-General, invited the Board to put a construction on the gift which would amount, in effect, to disregarding the words " the descendants of those settled in the " Colony hailing from or born in the North of Ireland." This is a tempting invitation, but it must be rejected. To follow such a course would be to make a new and, perhaps, a better codicil for the testator, instead of construing his words. It is to these words, as they have already been construed, that the principles laid down by the relevant authorities must now be applied.

It is to be observed at once that the object of the testator's bounty is prima facie a charitable object within the well-known classification in *Commissioners for Special Purposes of Income Tax* v. *Pemsel*,[1] being concerned both with education and with the advancement of a particular religious faith. It is, however, now well established that an element of public benefit must be present even in such gifts, if they are to stand in the privileged position of a charitable gift. This aspect of the law relating to charitable trusts has been more fully discussed and developed by the Board and in the House of Lords since the decision of the Full Court in the present case. Thus, in *Verge* v. *Somerville*,[2] Lord Wrenbury said, in delivering the judgment of the Board: " To ascertain whether a gift constitutes a valid charitable trust " so as to escape being void on the ground of perpetuity, a first " inquiry must be whether it is public—whether it is for the " benefit of the community or of an appreciably important class " of the community. The inhabitants of a parish or town or any " particular class of such inhabitants, may, for instance, be the " objects of such a gift, but private individuals, or a fluctuating " body of private individuals, cannot." In *Oppenheim* v.

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[1] [1891] A.C. 531, 583; 7 T.L.R. 657.

[2] [1924] A.C. 496, 499; 40 T.L.R. 279.

Tobacco Securities Trust Co. Ltd.[3] Lord Simonds said: "It is a "clearly established principle of the law of charity that a trust is "not charitable unless it is directed to the public benefit. This is "sometimes stated in the proposition that it must benefit the "community or a section of the community . . . With a single "exception, to which I shall refer, this applies to all charities. "We are apt now to classify them by reference to Lord Mac-"naghten's division in *Income Tax Commissioners* v. *Pemsel*,[4] "and as I have elsewhere pointed out, it was at one time "suggested that the element of public benefit was not essential "except for charities falling within the fourth class 'other pur-"'poses beneficial to the community.' This is certainly wrong "except in the anomalous case of trusts for the relief of poverty "with which I must specifically deal. In the case of trusts for "educational purposes the condition of public benefit must be "satisfied. The difficulty lies in determining what is sufficient "to satisfy the test, and there is little to help your Lordships "to solve it." No question of the relief of poverty arises in the present case. Lord Simonds later observed[5]: "A group of "persons may be numerous but, if the nexus between them is "their personal relationship to a single propositus or to several "propositi, they are neither the community nor a section of the "community for charitable purposes"; and later he added: "It "must not, I think, be forgotten that charitable institutions enjoy "rare and increasing privileges, and that the claim to come "within that privileged class should be clearly established."

Lord Normand said[6]: "No general rule has yet been formu-"lated by which to distinguish trusts which have this essential "element of public benefit and those which have not, and the "valiant attempts of counsel to arrive at a rule have failed to "convince me. I am, however, satisfied that the element of "public benefit must be found in the definition of the class of "persons selected by the truster as the objects of his bounty. "That seems to me to follow from the principle that the trust "purpose must be directed to the benefit of the community or "a section of the community. (Tudor on Charities, 5th ed., "p. 11, approved by Lord Greene M.R. in *In re Compton*.[7]) The "truster may have selected a class of persons which forms an "aggregate that is not a section of the community, and if he has

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[3] [1951] A.C. 297, 305; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

[4] [1891] A.C. 531.

[5] [1951] A.C. 306.

[6] Ibid. 309.

[7] [1945] Ch. 123, 128; 61 T.L.R. 167; [1945] 1 All E.R. 198.

"done that the trust will fail for perpetuity. All depends on "the attribute by which the selection of the class is determined."

Their Lordships find it unnecessary to refer to any other authorities. The principles thus laid down must be applied to the facts of each particular case, and their Lordships have not found it easy to decide on which side of the line falls the trust which the testator desired to establish. They will assume that the college to be established was intended to provide a general education and not only to give education in the standards of the Westminster Divines. Even so, they are unable to hold that the objects of the trust are either the community or a section of the community. They clearly are not "the community," for the testator has been at pains to impose particular and somewhat capricious qualifications upon the persons who are to benefit from this education. Nor can these persons, in their Lordships' opinion, be "a section "of the community" in the sense in which these words have been interpreted in the authorities. The facts which must be proved by any boy who claims to come within the class of beneficiaries have already been stated, and it is clear that the nexus between the beneficiaries is simply "their personal relationship "to several propositi," namely, certain persons living at the death of the testator. And these persons are not themselves, in their Lordships' view, a section of the community. They are certain Presbyterians who can establish a particular descent. Moreover, the qualifications which a boy must possess in order to benefit are in some respects wholly irrelevant to the educational object which the testator had in mind. It cannot be said that boys whose Presbyterian ancestors (living on January 21, 1897) trace their descent from emigrants from Northern Ireland are in greater need of education in the standards of the Westminster Divines than other boys whose Presbyterian ancestors (living as aforesaid) are descended from emigrants from, e.g., England or Scotland. In their Lordships' opinion the qualifications laid down by the testator have the result of making beneficiaries under the trust nothing more than "a fluctuating body of private "individuals," and the gift must fail because the element of public benefit is lacking. This being so, they need not consider further the argument as to uncertainty already mentioned. Counsel for the respondents relied strongly upon the case of *In re Tree.*[8] That case is, however, distinguishable from the present case on the ground that the element of poverty was present, but their Lordships doubt if the decision could have been justified had that element been absent.

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[8] [1945] Ch. 325; 61 T.L.R. 383; [1945] 2 All E.R. 65.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed, and it should be declared, in answer to question 10 (a) of the originating summons, that the devise of Block 70B contained in the codicil of April 3, 1895, was not a valid charitable devise.

The costs of all parties to this appeal, as between solicitor and client, must be paid out of the funds representing the proceeds of sale of Block 70B. The order of the Full Court as to the costs of the proceedings before it will not be disturbed.

Solicitors: *Bell, Brodrick & Gray; Light & Fulton.*

C. C.

J. C.*
1959
April 20.

DORIS CAROLINE MARY LEAHY AND OTHERS APPELLANTS;

AND

ATTORNEY-GENERAL FOR NEW SOUTH WALES AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (New South Wales)—Charity—Religion—Charitable and non-charitable purposes—Trust for "Order of Nuns of the Catholic "Church or the Christian Brothers"—Non-charitable orders among "orders of nuns"—Gift an endowment to order selected—Orders perpetual in form—Failure of gift to a non-charitable order—Trust validated under statutory provision that no trust rendered invalid by inclusion of non-charitable purpose—Trust for provision of amenities in convents—Composite expression embracing both charitable and non-charitable purposes—Saved by same statutory provision —Conveyancing Act, 1919–1954 *(N.S.W.), s. 37D.*

Charity—Endowment or gift to members of association.

A testator, who died in 1955, by his will, made in 1954, provided by clauses 3 and 5: "3. As to my property known as 'Elmslea' . . . "upon trust for such order of nuns of the Catholic Church or the "Christian Brothers as my executors and trustees shall select . . ." "5. As to all the rest and residue of my estate both real and "personal . . . upon trust to use the income as well as the capital

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD COHEN, LORD SOMERVELL OF HARROW and LORD DENNING.

"to arise from any sale thereof in the provision of amenities in "such convents as my said executors and trustees shall select either "by way of building a new convent . . . or the alteration of or "addition to existing buildings occupied as a convent or in the "provision of furnishings in any such convent or convents . . . the "receipt of the Reverend Mother . . . of that particular order of "nuns or convent shall be a sufficient discharge . . . for any payment under this clause."

It was not disputed that the phrase "orders of nuns" was not used in its strict canonical sense, but included also Congregations of Sisters, and among the orders were contemplative orders, which were not regarded as charitable in the legal sense of that word. By section 37D of the Conveyancing Act, 1919–1954, of New South Wales: "(1) No trust shall be held invalid by reason that some "non-charitable and invalid purpose as well as some charitable "purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any "part thereof is by such trust directed or allowed."

On an originating summons issued by the trustees of the will to have determined the validity of the dispositions in clauses 3 and 5:—

Held, first, that the gift in clause 5 was saved from invalidity by section 37D of the Conveyancing Act. That section applied not only where a testator had expressly indicated alternative purposes, the one charitable and the other non-charitable or not necessarily charitable, but applied also where, as here, the gift was for a purpose described in a composite expression embracing both charitable and non-charitable purposes, for both orders of nuns, the charitable and non-charitable—active and contemplative, the valid and the invalid—were embraced in the single phrase "orders of "nuns."

In re Belcher [1950] V.L.R. 11 overruled.

The section, which applied alike to invalidity due to uncertainty or perpetuity, would apply where the gift was for an object so predominantly charitable—such as an Order of Nuns—that a charitable intention on the part of the testator could be fairly assumed, or for (say) benevolent purposes, which connoted charitable as well as non-charitable purposes. Not every expression, however, which might possibly justify a charitable application was brought within the section.

In re Hollole [1945] V.L.R. 295 approved.

Held, secondly, that there were ample indications in this case to displace the prima facie conclusion that the gift in clause 3 was to the individual members of the selected order of nuns or Christian Brothers at the date of the testator's death so that they could together dispose of it as they thought fit. The dominant and sufficiently expressed intention of the testator was that the gift in the clause was to be an endowment of the order or orders selected to be held as an endowment, and that, as the order or orders were according to their form perpetual the gift must, if it was to a non-charitable order, fail. The gift made by clause 3 was, therefore, valid by reason only of the provisions of section 37D of the Conveyancing Act, and the power of selection given by the clause to the trustees did not extend to Contemplative Orders of Nuns.

Dicta of Lord Buckmaster in *In re Macaulay's Estate* (reported as footnote to *In re Price* [1943] Ch. 422, 435; 59 T.L.R. 367; [1943] 2 All E.R. 505) applied.

Morice v. *Bishop of Durham* (1804) 9 Ves. 399; (1805) 10 Ves. 522; *Cocks* v. *Manners* (1871) L.R. 12 Eq. 574; *In re Ray's Will Trusts* [1936] Ch. 520; 52 T.L.R. 446; *In re Drummond* [1914] 2 Ch. 90; 30 T.L.R. 429, and *In re Cain (Decd.)* [1950] V.L.R. 382 considered.

Judgment of the High Court of Australia varied but affirmed in the result.

APPEAL (No. 28 of 1958), by special leave, from a judgment and order of the High Court of Australia (March 11, 1958) allowing an appeal by the present respondent, the Attorney-General for New South Wales from part of a judgment and order and dismissing an appeal by the present appellants from another part of the judgment and order of the Supreme Court of New South Wales in Equity (April 11, 1957) which determined questions raised in an originating summons as to the construction and validity of certain dispositions made by the will of Francis George Leahy.

The following facts are taken from the judgment of the Judicial Committee: The appellants in this case were the widow and children of a wealthy Australian, Francis George Leahy, who died on January 11, 1955. The respondents were the trustees of his will, which was made on February 16, 1954, and Her Majesty's Attorney-General in and for the State of New South Wales.

The questions raised in the appeal concerned the validity of the dispositions made by two clauses of the will which may at once be conveniently referred to and, so far as is necessary, stated verbatim. By his will the testator, after appointing executors and trustees and giving legacies of £1,000 each to the Reverend Mother or person in charge for the time being of St. Joseph's Convent at Bungendore in the State of New South Wales and to the Rector for the time being of the Passionist Fathers, Mary's Mount, Goulburn, with specific directions as to the disposal of such sums, and after making certain dispositions in favour of members of his family which need not be further mentioned, by clause 3 provided as follows: "3. As to my property known as 'Elmslea' situated at Bungendore aforesaid "and the whole of the lands comprising the same and the whole "of the furniture contained in the homestead thereon upon trust "for such order of nuns of the Catholic Church or the Christian "Brothers as my executors and trustees shall select and I again "direct that the selection of the order of nuns or Brothers as "the case may be to benefit under this clause of my will shall "be in the sole and absolute discretion of my said executors and "trustees."

By clause 4 he devised and bequeathed certain other property in New South Wales upon certain trusts and subject to certain conditions in favour of an order of nursing sisters known as "The Nursing Sisters of the Little Company of Mary," and by clause 5 he disposed of the residue of his real and personal property in the following terms: "5. As to all the rest and "residue of my estate both real and personal of whatsoever kind "or nature and wheresoever situated upon trust to use the income "as well as the capital to arise from any sale thereof in "the provision of amenities in such convents as my said executors "and trustees shall select either by way of building a new "convent where they think necessary or the alteration of or "addition to existing buildings occupied as a convent or in the "provision of furnishings in any such convent or convents and "I declare that my said executors and trustees shall have the "sole and absolute discretion of deciding where any such premises "shall be built or altered or repaired and the order or "orders of nuns who shall benefit under the terms of this clause "the receipt of the Reverend Mother for the time being of that "particular order of nuns or convent shall be a sufficient discharge "to my said executors and trustees for any payment "under this clause."

Finally, the testator directed that the trustees should be at liberty to sell and dispose of the whole or any part of his real or personal estate as they in their absolute discretion should think fit and in the meantime should have the wide powers of leasing and management therein mentioned.

Questions as to the validity of the dispositions made by clauses 3 and 5 came before the Supreme Court of New South Wales on an originating summons issued by the trustees and it was held by Myers J. (1) that there was no territorial limitation in the will which would restrict the selection by the trustees to Orders in New South Wales or Australia, that once the recipient, whether an Order of Nuns or the Christian Brothers, had been selected the gift was an absolute one to the selected body and that, as there was no uncertainty or perpetuity, the disposition by clause 3 was valid, but (2) that the disposition of residue by clause 5 was invalid in that it involved the devotion of property to purposes not necessarily charitable for a period longer than that permitted by the rule against perpetuities and was not in his opinion saved by section 37D of the Conveyancing Act, 1919–1954.

Upon appeal to the High Court of Australia (Dixon C.J., McTiernan, Williams, Webb and Kitto JJ.) that court (1) affirmed the order of Myers J. in regard to the disposition made by clause 3 holding (by a majority) that an absolute gift was thereby established in favour of the selected beneficiary and (unanimously) that in any case it was saved by section 37D, but (2) allowed the appeal in regard to the disposition made by clause 5 holding (again unanimously) that it was saved from invalidity by the section. From that order the testator's widow and children appealed to Her Majesty in Council.

Section 37D of the Conveyancing Act, 1919–1954, which had been the subject of much judicial discussion, as had its prototype, section 131 of the Property Law Act, 1928, of the State of Victoria, was in the following terms: "(1) No trust shall be "held to be invalid by reason that some non-charitable and "invalid purpose as well as some charitable purpose is or could "be deemed to be included in any of the purposes to or for "which an application of the trust funds or any part thereof "is by such trust directed or allowed.

"(2) Any such trust shall be construed and given effect "to in the same manner in all respects as if no application of "the trust funds or of any part thereof to or for any such "non-charitable and invalid purpose had been or could be deemed "to have been so directed or allowed.

"(3) This section shall not apply to any trust declared before "or to the will of any testator dying before the commencement "of the Conveyancing, Trustee and Probate (Amendment) Act, "1938."

1959. January 22, 26, 27, 29. *A. B. Kerrigan Q.C.* and *D. S. Hicks* (both of Australia) for the appellants. The appeal involves the construction of clauses 3 and 5 of the will and the application of section 37D of the Conveyancing Act of New South Wales to the provisions of the will. The evidence before the Supreme Court was that there are two kinds of organisations of religious women in the Roman Catholic Church—orders and congregations. Both kinds of those institutions exist in Australia.

Among the orders in New South Wales there are two kinds, active and contemplative. The Christian Brothers are a teaching congregation of religious men. All the orders and congregations are officially recognised by the Catholic Church. If the dispositions made by clauses 3 and 5 were trusts for the purposes of the order or orders that would be selected, then the field of selection included what might be called non-charitable orders, namely, the contemplative orders, and that raised for consideration, if these were trusts for purposes, the attraction and effect of section 37D of the Conveyancing Act.

With regard to the disposition in clause 3, it is not contended that the phrase " orders of nuns " does not include congregations of sisters. It is submitted, however, that the field of selection is not sufficiently defined and that such uncertainty invalidates the power. When a testator gives a power to his trustees to select from a field, he should mark out the field with sufficient precision that his trustees know exactly the ambit. There is nothing in this will which enables the trustees to say whether they are at liberty to consider all the orders of nuns in the world or whether they must confine themselves to some territorial limitation, and, if so, what is that limitation. He gave them no guidance.

The second submission is that Dixon C.J. and McTiernan J. were correct in deciding that " Elmslea " was not an absolute and immediate gift to persons; they were correct in saying that it was a gift for purposes and not a gift to persons. In clause 3 there is no identification of persons with reference to a place or any other basis which might be called a community basis. There is here no intention to pass any beneficial interest to any individual. The testator has stated that the order is to benefit; it was not intended to give beneficial interests to each and every individual that constituted the order. If the testator intended this to be a gift to individuals, absolute and personal, it would mean that the trustees, if called upon by the order, would have to transfer it to all the members of the order all over the world, which is not to be presupposed and is an intention which one would be loth to attribute to the testator. The alternative is that it is a gift to the order for its benefit—for the purpose of carrying on its work. It was a gift for purposes and not to persons; where in his will he intended to benefit persons it was so stated.

Next, because in the field—whether it be New South Wales or the world—some of the orders of nuns are non-charitable, if the gift is for the purposes of the order selected then one has to consider the application of section 37D. The submission is that that section is not attracted to this gift at all. When one looks at section 37D what has to be found is a trust perfectly constituted in every respect, save that property may be applied to some non-charitable and invalid purposes as well as to some charitable purpose; but it must be a perfectly constituted trust in every respect. There is no trust at all in clause 3; it merely sets out a power to select. Not being confined in its exercise to legal charitable objects, because it ranges over contemplative as well as active orders, there is no combination of persons who can come to the court and ask for its exercise. [Reference was made to *Inland Revenue Commissioners* v. *Broadway Cottages Trust.*[1]] Where there is a power to select from a class the trust is not fully constituted until the power is exercised. The statute meant what it said—a trust and not a power—and unless and until the trust is constituted the section cannot operate.

The next point was not taken below, but is taken in the printed case. It is assumed for the purposes of this point that it is not a gift to persons; and the submission is that it may be a gift not for purposes as such, but a gift for the benefit of institutions. To put it in that way may be a little baffling, but if it is properly construed as a gift to the institutions to deal with it as the members collectively wish, then it would not be a gift to purposes within the ambit of section 37D. The testator has made it clear, it is submitted, that his gift was to be a benefit to certain institutions.

Before section 37D can apply to save this gift from failing because of the presence of the contemplative orders one has to find that the purposes include invalid purposes as well as non-charitable purposes. The gift construed in the way suggested does not fail for any invalidity in the purpose, but it fails because the trust is unenforceable, it not being established who could come and enforce the exercise of the power. There was no invalidity of purpose in the purpose of a non-charitable order, and therefore the section was not attracted; all that one has left was a gift to an order to be selected, which might or might not be charitable, and that gift was left in the realm of uncertainty.

Coming to the residue; the argument that has been put on the question of the field of selection of the orders of nuns is again submitted. There are, however, three additional grounds of uncertainty in relation to the trust of residue: (1) The power in this case is a power of selection to be exercised from time to time, and there is no indication in the will whether the orders from which the selection may be made must be in existence at the date of the testator's death or whether they include congregations founded after his death. If the words give the trustees unlimited power of selection, then it must be taken to be unlimited in point of time as well as in point of territory, and consequently the testator has left it uncertain whether the trustees can in years to come include orders that have been founded after his death. (2) In this gift in clause 5 what has to be selected is not an order to receive the gift but a convent, and while all the orders in the world may be ascertained with certainty, it is submitted that all the convents in the world cannot. (3) The third additional point of uncertainty arises out of the word "amenities." This word has been defined by the will itself, but whether it has been defined to the point of certainty is the question. The word "furnishings" is too wide and too broad for any certain meaning to be given to it. With regard to "amenities," where there are buildings and other benefits which are not directly devoted to charitable uses, the test seems to be: is the gift calculated to further the charitable work of the institution or promote its efficiency?: *In re Coxen* [2]; *In re Dean's Will Trusts*.[3]

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[1] [1955] Ch. 20, 35; [1954] 1 W.L.R. 659; [1954] 3 W.L.R. 438; [1954] 1 All E.R. 878; [1954] 3 All E.R. 120.

The next question is whether section 37D is attracted to this disposition of residue. First, it is a disposition of income in perpetuity—that does not appear to be disputed. Secondly, the disposition is incomplete unless and until the power of selection is exercised. Thirdly, the selection has to take place in two ways: it has to be a selection of amenities as described, and a selection of convents. When that is done, a question arises whether the provision of those amenities in the particular convent is a disposition in favour of persons or of purposes. Clause 5, it is submitted, must be a gift to persons. The testator had not in mind the purposes of the convent in which the amenities were to be created, but the comfort of the nuns who had accepted the conventual life. If that is so, it is an end of the matter, because it is a perpetuity, the perpetual income to be spent from time to time for the personal enjoyment of the fluctuating body of persons. If that submission is wrong, then, of course, the alternative is a gift for the purposes of the order, and the question then is whether the property could be used for non-charitable and invalid purposes as well as for charitable purposes. It is a perpetuity, and that is of the nature of the property which is disposed of and not of the nature of the purpose to which it is to be applied. The gift fails not because any purpose, charitable or non-charitable, is invalid, but because it is a perpetuity.

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[2] [1948] Ch. 747, 754; [1948] 2 All E.R. 492.

[3] (1950) 66 T.L.R. (Pt. 1) 728; [1950] 1 All E.R. 882.

[Reference was made to the history of section 37D and to the following cases: *In the Will of Forrest*[4]; *In re Griffiths*[5]; *In re Bond*[6]; *Roman Catholic Archbishop of Melbourne* v. *Lawlor*[7]; *In re Hollole*[8]; *In re Price*[9]; *Union Trustee Co. of Australia Ltd.* v. *Church of England Property Trust, Diocese of Sydney*[10]; *In re Belcher*[11]; *Perpetual Trustee Co. (Ltd.)* v. *King George's Fund for Sailors*[12]; *In re Ingram*,[13] and *In re Ashton, decd.*[14]] To complete the cases there are two English authorities to which reference may usefully be made: *In re Gillingham Bus Disaster Fund*[15] and *Robert Batcheller & Sons Ltd.* v. *Batcheller.*[16]

The submissions in summary are: (1) Section 37D does not apply unless there is a constituted trust, as distinct from a power, and there is no such constituted trust here. (2) If there is, there is no invalid non-charitable purpose in it. (3) If there is a trust, there is no charitable purpose included expressly or by necessary implication. (4) Before the statute, trusts of this sort that failed fell into two main types: (a) where the donor had expressed some non-charitable and indefinite purpose as an alternative to some expressed charitable purpose—the classical example being "charitable or benevolent"; (b) where the donor had used a compendious descriptive phrase which was either completely uncertain or at any rate too indefinite to be confined to charity. It is submitted that the section was only designed to cure the first type of failure. (5) If Elmslea could be construed as a gift to the individual members of the order, then by a parity of reasoning the gift of residue could be equally so construed because of the words "for the benefit of an order or orders of nuns." (6) In the case of both Elmslea and the residue the testator had his mind on alleviating the rigour of the life of the nuns and not on their charitable works. The trusts in respect of both Elmslea and the residue are void, and neither disposition was validated by section 37D of the Conveyancing Act.

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[4] [1913] V.L.R. 425, 429, 433.
[5] [1926] V.L.R. 212.
[6] [1929] V.L.R. 333.
[7] (1934) 51 C.L.R. 1, 14 et seq.
[8] [1945] V.L.R. 295.
[9] (1935) 35 N.S.W.S.R. 444.
[10] (1946) 46 N.S.W.S.R. 298, 302.
[11] [1950] V.L.R. 11, 14 et seq.
[12] (1949) 50 N.S.W.S.R. 145, 148.
[13] [1951] V.L.R. 424, 427.
[14] [1955] N.Z.L.R. 192, 197–205.
[15] [1958] Ch. 300, 305–306; [1957] 3 W.L.R. 1069; [1958] 1 All E.R. 37; [1959] Ch. 62; [1958] 3 W.L.R. 325; [1958] 2 All E.R. 749.
[16] [1945] Ch. 169, 176; 61 T.L.R. 233; [1945] 1 All E.R. 522.

Nigel Bowen Q.C. (Australia) and *J. G. Le Quesne* for the respondent, the Attorney-General for New South Wales. The Attorney-General supports the application of section 37D to these gifts, and in particular to the gift of residue in clause 5. The Attorney-General would only come into the argument on clause 3 should it be held to be not an absolute gift, in which case he would seek to apply section 37D to clause 3 as well as to clause 5. The first submission on the section is that there must be a trust, but that the section applies to incompletely constituted trusts or trusts of imperfect obligation or invalid trusts. [Reference was made to *In the Will of Forrest* [17] and *In re Catherine Smith.*[18]] The second matter on the section is that the trust must be for purposes in the sense that the application of the trust funds to purposes is either directed by the testator or allowed by his provision. Thirdly, some non-charitable and invalid purposes as well as some charitable purposes must be included in the authorised purposes. Fourthly, it is sufficient if both the non-charitable and charitable purposes could be deemed to be included in any of the authorised purposes. If the language which the testator has used is capable of comprehending both the charitable and the non-charitable purposes, the section will apply. The fifth point on the section is that the section does not require that this result of having these mixed purposes—the inclusion of non-charitable and invalid as well as charitable—should be produced in any particular way so long as it is produced. It is not necessary to use the word "charity," or to state the non-charitable and the charitable purposes by separate and distinct provisions. The sixth point is that the use of the words in the section "in any "of the purposes" speak of some non-charitable and invalid purpose as well as some charitable purpose being included. There are some purposes which, in their nature, are indivisible (*Roman Catholic Archbishop of Melbourne* v. *Lawlor* [19]), but, where a purpose is divisible, the section is explicit that one has to divide even one purpose. The testator must specify the purposes amongst which his trustees may select. *In re Hollole* [20] was rightly decided. The seventh point is that when the section refers to a non-charitable and invalid purpose, it does not place any restriction on the type of invalidity or the reason for invalidity which will attract the operation of the section. It does not require invalidity by reason of uncertainty, on the one hand, and exclude invalidity by reason of perpetuity, on the other hand, or vice versa. The eighth point is that when the section says that the application of the trust funds is directed or allowed by the testator, it seeks to make it clear that, if a testator confers on his trustees a right to select from expressed purposes, the section will apply. He does not have to express a preference himself. The ninth and final point is that the section operates at the point of construing the trust.

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[17] [1913] V.L.R. 425.

[18] [1937] N.Z.L.R. 33.

[19] 51 C.L.R. 1.

[20] [1945] V.L.R. 295.

A gift for "religious purposes" has been read down by the courts as a gift to those which were charities: *In re White*[21]; *In re Price*.[22] Clause 5 is a trust, and a trust for purposes. If all the orders were charitable, there is no doubt that any of these purposes would be charitable purposes; all would be. It is only the existence of some contemplative orders which, by concession, are not charitable, which reveals that some of the purposes are not charitable. Clause 5 permits application either to non-charitable and invalid purposes or to charitable purposes. That is the situation to which section 37D is designed to apply. There is no difficulty in applying it here; the severance leaves the testator's intention to operate so far as some of his expressed purposes are concerned, and stays the hands of the trustees from selecting those purposes which are non-charitable. It would be a compliance with the direction of the testator if the trustees applied the whole of the funds to charitable orders. It would also be a complete obedience to the directions if, in the exercise of their discretion, they even applied the whole to the non-charitable orders, and, of course, equally so if they applied part to charitable and part to non-charitable.

With regard to clause 3, the Attorney-General is content that it should be regarded as an immediate gift to the orders. If the Board does not accept that view, there are three possibilities: first, that section 37D would apply to the whole of the gift so as to eliminate the discretion of the trustees so far as they might apply Elmslea in favour of orders of nuns which are not charitable, leaving the field of selection amongst orders of nuns which were charitable and, of course, amongst the Christian Brothers. As to the use of the word "deemed," it is submitted that its

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[21] [1893] 2 Ch. 41; 9 T.L.R. 32, 261.

[22] 35 N.S.W.S.R. 444.

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ordinary English meaning includes the formation of an opinion or "to consider": Oxford English Dictionary; *De Beauvoir* v. *Welch.*[23] "Deemed" in section 37D is used in its ordinary sense of "judge, hold or consider," and it follows that the words "deemed to have been so directed" are put in this section so as to ensure that cases are covered in which the testator has not specified the purposes, but has given criteria and left his trustees to judge what purposes satisfy those criteria. Of course, the criteria which he gives must be capable of being satisfied both by charitable and non-charitable objects. It is submitted, therefore, that Mr. Kerrigan's submission that section 37D applies only where the donor has expressed some non-charitable and indefinite purpose as a distinct alternative is wrong. If it were right, no operation could be given to the word "deemed," and Mr. Kerrigan gives no operation to it; he virtually says that it is meaningless and discards it altogether.

It is submitted that the section does not apply where a testator has not stated the purposes. The High Court's judgment in the present case is consistent with that view. There must be a line where it is difficult to determine whether, in a particular case, the testator has sufficiently marked out his purposes, or whether they are vague and indeterminate and he has really passed over to his trustees the task of determining the purposes. It is submitted that this case is clearly on the right side of the line. The line would not reach where the purpose is not stated or where a term is so vague or indeterminate that one cannot say the testator has marked out the charitable or non-charitable. In the High Court a clear choice is expressed between the narrow view adopted in *In re Belcher* [24] and the wider view adopted in the *Union Trustee* case.[25]

Next, whether the trust was for orders which were world wide or limited to New South Wales is not a question of uncertainty in this case, but of construction. There is no geographical limitation in the words.

[Counsel was not required to deal with uncertainty in relation to amenities.]

Mr. Kerrigan said that the disposition in clause 5 was invalid because it was a perpetuity, and, being for purposes, could not be saved unless the purposes were charitable, and he seeks to have that operate to strike down the gift before the section can reach it to save it. Various cases in Victoria, New South Wales and New Zealand on this section were commented on, but they do not take the matter very far. *In re Belcher* [26] was, it is submitted, wrongly decided. [Reference was also made to *Lemm* v. *Federal Commissioner of Taxation* [27]; *In re Bond* [28]; *In re Griffiths* [29]; *Roman Catholic Archbishop of Melbourne* v. *Lawlor* [30]; the English Charitable Trusts (Validation) Act, 1954, and the *Gillingham Bus* case.[31]]

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[23] (1827) 7 B. & C. 266.

[24] [1950] V.L.R. 11.

[25] 46 N.S.W.S.R. 298.

As to "Elmslea," the disposition is not uncertain and is a valid exercise of testamentary power without regard to the charitable element of the organisations indicated, or, alternatively, is by operation of section 37D to be restricted to a disposition in favour of such orders of nuns as are charitable, or the Christian Brothers, as the trustees may select. As to the residue, section 37D applies and requires that the trust be construed and given effect to in the same manner in all respects as if no application of the residue in favour of any convent or order of nuns as was not charitable were directed or allowed.

B. P. MacFarlane Q.C. and *D. G. McGregor* (both of Australia) for the respondent trustees. We wish to deal only with clause 3 of the will. It is submitted: (1) That on its true construction clause 3 conferred an absolute gift upon the order selected by the trustees. (2) That on the true construction of the clause the gift was an absolute gift to the individuals who are members of the order as tenants in common at the date of the gift. (3) That it is not material whether the order selected was charitable in the legal sense or not. The first of those three submissions is argued in the alternative to the second. From the point of view of the trustees the second construction is the one which is fraught with the most practical difficulties in administering the trust. The first submission is put in preference to the second—that it is an absolute gift to the order. The question of perpetuity does not enter into this matter in relation to clause 3 at all. If there is a gift of "Elmslea" to the order for its benefit, the property is to be held by the statutory trustees of the order for the benefit of the order.

There are really two questions to be met—whether this is a direct gift to an order, which is my preferred contention, or whether it is a direct gift to the individuals who comprise the order at the date of death, which is my secondary contention;

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[26] [1950] V.L.R. 11.
[27] (1942) 66 C.L.R. 399.
[28] [1929] V.L.R. 333.
[29] [1926] V.L.R. 212.
[30] 51 C.L.R. 1.
[31] [1959] Ch. 62.

and even if that is so, is there a perpetuity created by the provisions of clause 3, because it would seem on the authorities that, if there is a perpetuity created, there is no direct gift. There are no words in clause 3 which tie up the use of income from this property—income is not directed to be held and used over a period of years. Then the reference to the whole of the furniture in "Elmslea" is more appropriate to the case of an absolute gift than the case of a settled gift. Also, there are no restrictions as to user in clause 3. There are no active duties imposed on the trustees by this will with respect to "Elmslea" in clause 3.

Some of the authorities in relation to these points undoubtedly held that in particular cases there was a gift to individuals beneficially who combined to form an unincorporated body. Those are cases, broadly speaking, of gifts to churches or monastic bodies or orders of nuns. The other class of cases is one, it is submitted, where there have been decisions that unincorporated bodies are entitled to take as direct gifts bequests under wills and the property so given is to be held for the benefit of those bodies. In the first case, *Cocks* v. *Manners*,[32] Wickens V.-C. would appear to have decided that the gift was to individual members of the Dominican convent; he held that the Dominican convent was not a charitable body. That case supports the propositions stated above, particularly the third, namely, that for the purposes of the first and second propositions it is irrelevant whether or not the donee of the gift is or is not a charity. The next case is *In re Clarke*[33]; the real problem is to construe the instrument making the gift. If the construction of clause 3, unaided by any circumstance outside the will, is plainly the language of gift and not endowment, it does not cease to be the language of gift simply because, to take this case, it is not shown that the constitutions of some bodies within the field of selection do not tend towards perpetuity. In *In re Smith*[34] Joyce J. was able to construe the will on the basis that it was a direct gift to the individuals concerned. In *In re Drummond*[35] it was held that the gift was to the association and not to the individual members, and that it was not a gift which was a perpetuity. If the submission that the constitution of the society is irrelevant does not find favour with the Board, then very strong reliance is placed on *In re H. J. Ogden*.[36] In *Perpetual Trustee Co. (Ltd.)* v. *Wittscheibe*[37] it was argued that there was a gift to the individual members of the Franciscan Order at Waverley, and reliance was placed on *In re Smith* [38]; Williams J. held it to be a good charitable gift, but secondly that if it was not a charitable gift it did not tend to a perpetuity and it was a good gift to the Commissary for the benefit of the order in distinction from the members of the order. *Wittscheibe's* case [39] is consistent with and supports the submissions made above as to the general validity of clause 3. In *In re Price* [40] it was held that a gift could validly be made to an unincorporated body.

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[32] (1871) L.R. 12 Eq. 574, 585.
[33] [1901] 2 Ch. 110; 17 T.L.R. 479.
[34] [1914] 1 Ch. 937; 30 T.L.R. 411.
[35] [1914] 2 Ch. 90; 30 T.L.R. 429.
[36] [1933] Ch. 678; 49 T.L.R. 341.
[37] (1940) 40 N.S.W.S.R. 501.

There must be a distinction drawn between a perpetuity created by the will and perpetuity created by the rules or constitution instrument of the association. In *In re Ogden*,[41] *In re Price* [42] and *In re Macaulay's Estate* [43] the judges had looked to the terms of the will. If, on the true construction of the will, the terms of the gift made by the testator incorporated the rules of the donee organisation and those rules created a perpetuity, then it is not denied that the gift would fail in accordance with the terms of the will. What was said by Lord Buckmaster and Lord Tomlin in *Macaulay's* case [44] does support the submissions for the trustees here; one does not know whether or not the rules of the Folkestone Lodge were fully before any of the courts below or in the record before the House of Lords. That the rules were not relevant on the question of perpetuity in the view of their Lordships is, it is submitted, apparent from the language they used. There was much in *Ogden's* case [45] of a character similar to the facts of the present case.

Clause 3 is valid as an absolute gift in favour of whatever order of nuns or the Christian Brothers was chosen by the trustees.

Kerrigan Q.C. in reply. If it is a gift to purposes, it is conceded that section 37D would operate to save it for the Christian Brothers. If Mr. Macfarlane is right, then, of course, it becomes an absolute gift to the association selected, and if there is no perpetuity I again get no comfort. If, on the other hand, neither of those propositions is correct, and the Board find that it must be construed as a gift to the individual members of the order, then the submission is that, if this gift can be so construed, there is room for a similar construction with respect to clause 5 because of the similarity of the words—for the benefit of the order. In testing whether the trustees could give the whole of the property in residue to a non-charitable order of nuns or to a charitable order, one would have to examine what the testator said; did he, in other words, manifest in what he said an intention that they could give it either to charity or non-charity as they wished.

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[38] [1914] 1 Ch. 937.

[39] 40 N.S.W.S.R. 501.

[40] [1943] Ch. 422; 59 T.L.R. 367; [1943] 2 All E.R. 505.

[41] [1933] Ch. 678.

[42] [1943] Ch. 422.

[43] [1943] Ch. 435.

[44] Ibid.

[45] [1933] Ch. 678.

Lemm's case [46] is no authority for a wider interpretation of section 37D of the Conveyancing Act, and that case does not help either way. Looking at the words of that section, the words "no trust" were used in a technical sense; it is hard to understand in what other sense they were used. That is the answer to the construction of the statute. With regard to the difficult phrase "deemed to be included," it is submitted that the words themselves could not be applied to the charitable purposes that one had to find. One could apply them and deem in a non-charitable and invalid purpose, but one could not take a phrase and say, "we can deem in both types of purposes." In short, the charitable purpose must be found either from the expressions used or by necessary implication from those expressions, and there was no warrant for deeming in a charitable purpose; that had to be found.

Mr. Bowen said that section 37D will apply to every gift which specifies the purpose. But that proposition does not supply a clear line upon which the section can work at all, whereas the proposition that one has to find in the document the expression of intention or the implication does provide a clear line. That brings one back to the construction of what the testator said, and whether one applies the principle I contend for or Mr. Bowen's specified purposes, there is nothing in this case—in respect of residue—which inescapably throws the mind of the construer to the conclusion that the testator had a charitable intention. The testator left it in a state of indifference. This is a gift for personal enjoyment and, being a perpetuity, must fail.

April 20. The judgment of their Lordships was delivered by VISCOUNT SIMONDS, who stated the facts set out above and continued: It will be observed that, in the relevant clauses of the will, the testator referred to "Orders of Nuns." It was, however, held in the High Court of Australia and has not been disputed before their Lordships that this phrase was not used in its strict canonical sense but included also Congregations of Sisters, of which there are a considerable number in Australia. It further appeared that among the Orders represented in Australia are Contemplative Orders. Such Orders are not regarded as charitable in the legal sense of that word.

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[46] 66 C.L.R. 399.

In these circumstances questions arose as to the validity of the dispositions made by clauses 3 and 5. It was conceded that, as the trustees had under clause 5 a power of selection amongst Orders which were charitable and Orders which were not charitable, the disposition of residue was invalid unless it was saved by the provisions of section 37D of the Conveyancing Act, 1919–1954. In regard to clause 3 the position was different. The respondent trustees urged as a second line of defence that the same section saved from invalidity the disposition made by that clause. But this alone was not enough for them; for, even if the plea was successful, it would not enable them to select a Contemplative Order as a beneficiary. Accordingly they urged that clause 3 was in effect an absolute gift to the Order which they might select: if so, no question of invalidity would arise: they would have freedom of choice amongst all Orders including Contemplative Orders.

[His Lordship stated the terms of section 37D of the Conveyancing Act and continued:] The genesis and purpose of this section are clear. As the law stood before its enactment, a gift to such charitable or other purposes as trustees might think fit was void, and this was the law whether the alternative to charitable purposes was the vague and general expression "other "purposes" or a less vague but still indefinite expression such as "benevolent purposes" or even a precisely defined non-charitable institution. Equally the gift was invalid if it was given for a purpose expressed in a compendious phrase which embraced both charitable and non-charitable objects. It was to remedy this state of the law that the section was enacted and their Lordships will observe at once that there is no reason to confine its operation to those cases in which the invalidity of the alternative gift is due to one cause rather than another. The language is clear and admits of no qualification. It applies alike to invalidity due to uncertainty or to perpetuity.

The disposition made by clause 5 will first be considered. A preliminary point can be disposed of. It was argued on behalf of the appellants that the word "amenities" was of such vague and uncertain meaning as to invalidate the whole gift. This argument ignores the fact that the testator in the succeeding sentence of his will explains what he means by "amenities" in language which cannot fairly be challenged on the ground of uncertainty. Their Lordships therefore approach the question of the application of the section upon the footing that the gift would be valid if all convents could be regarded as charitable, but, as they cannot, the section must be invoked to save it. They would only interpolate that upon the question (on which there was a difference of opinion in the courts of Australia) whether the Orders among which the trustees have a power of selection are in any way limited to Orders operating in New South Wales at the date of the death of the testator, they agree with the view expressed by the Chief Justice and McTiernan J. that the language of the will does not admit of any territorial limitation being placed upon the Orders which may benefit by the gift. This does not appear to affect in any way the question whether the section is applicable.

The real question can now be stated. It is whether the section only applies where the testator has expressly indicated alternative purposes, the one charitable, the other non-charitable or not necessarily charitable, or applies also where the gift is for a purpose described in a compendious expression which is apt to include both charitable and non-charitable purposes. In the latter case the further question will arise whether the section applies if the area of choice, however wide and indeterminate, admits of a charitable application or whether some specific indication of a charitable intention is demanded—a question of great nicety to which further reference will be made.

Upon the main question their Lordships are in agreement with the unanimous opinion of the judges of the High Court. The trust being declared to be the provision of amenities in convents in such manner as is prescribed with the further direction that the trustees are to have an absolute discretion as to the Order or Orders of Nuns who shall benefit, can it be predicated of it that it would be invalid (but for the section) by reason that some non-charitable and invalid purpose as well as some charitable purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed? For the sake of simplicity this may be regarded as a gift for the benefit of such Order of Nuns as the trustees may select. If the testator had expanded these words into "for such Order of Nuns whether "active or contemplative, as my trustees shall select," the gift would, but for the section, have been invalid, but the section would, as counsel for the appellants was constrained to admit, have clearly applied. But the area of selection is the same whether these words are expanded or not. Both Orders, the charitable and non-charitable, both purposes, the valid and the invalid, are embraced in the single phrase "Orders of Nuns." It appears to their Lordships not only that the language of the section upon a reasonable construction covers the case of a composite expression embracing charitable and non-charitable purposes, but that, as the present case forcibly illustrates, a contrary view leads to a result which cannot sensibly have been intended by the legislature. This conclusion accords with the overwhelming weight of authority in the courts of New South Wales and of Victoria and also of New Zealand where a similar Act is in force. The relevant cases are discussed in the several judgments of the High Court of Australia in the case now under appeal. Their Lordships respectfully concur in what is there said. They endorse the view that the judgment in *In re Belcher*[1] cannot be supported. Some reliance was placed by the appellants upon the expression "is or could be deemed to be included," but it is difficult to see how it helps them. On the contrary, as is pointed out by Kitto J., these words seem particularly appropriate to the case of a composite expression. There is no need for them if there is a clear-cut alternative between charitable and non-charitable purposes.

But, though their Lordships are of opinion that the section may operate where there is a composite expression covering charitable and non-charitable purposes, and does so in the present case, it is clear that not every expression which might possibly justify a charitable application is brought within it. For instance, in *In re Hollole*[2] there was a gift to a trustee "to be disposed "of by him as he may deem best." The trustee might presumably have deemed it best to dispose of it for a charitable purpose, and, if he had done so, could not be said to have exceeded his powers. Yet O'Bryan J. held that the gift was not saved by the section, and his decision has been rightly approved in the High Court. This was a clear case because the testator did not designate any purpose at all but in effect delegated his testamentary power in a manner that the law does not permit. Greater difficulty will arise where the permissible objects of choice are described in a composite expression which, though not so vague and general as to amount to a delegation of testamentary power, does not very clearly indicate a charitable intention on the part of the testator. "In the present case," say the Chief Justice and McTiernan J., "there is reference to a "distributable class which, while not exclusively charitable, is "predominantly charitable in character." The same concept appears in a different form in the judgment of Williams J. and Webb J. "One can also agree with him" (i.e., Myers J.) they say "that in order to satisfy the section the application of the "whole fund to charity must be one way of completely satisfying "the intention of the testator. But, if the trust either directs "or allows this to be done, the testator's intention will be com-"pletely satisfied if the trust funds are so applied. . . ." Thus whether the gift be to Orders of Nuns, an object so predominantly charitable that a charitable intention on the part of the testator can fairly be assumed, or for (say) benevolent purposes, which connotes charitable as well as non-charitable purposes, the section will apply. Inevitably there will be marginal cases, where an expression is used which does not significantly indicate a charitable intention, and their Lordships do not propose to catalogue the expressions which will or will not attract the section. It may be sufficient to say that in the chequered history of this branch of the law the misuse of the words "benevolent" and "philanthropic" has more than any other disappointed the charitable intention of benevolent testators and that the section is clearly designed to save such gifts.

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[1] [1950] V.L.R. 11.

[2] [1945] V.L.R. 295.

The disposition made by clause 3 must now be considered. As has already been pointed out, it will in any case be saved by the section so far as Orders other than Contemplative Orders are concerned, but the trustees are anxious to preserve their right to select such Orders. They can only do so if the gift is what is called an absolute gift to the selected Order, an expression which may require examination.

Upon this question there has been a sharp division of opinion in the High Court. Williams and Webb JJ. agreed with Myers J. that the disposition by clause 3 was valid. They held that it provided for an immediate gift to the particular religious community selected by the trustees and that it was immaterial whether the Order was charitable or not because the gift was not a gift in perpetuity. "It is given" they said (and these are the significant words) "to the individuals comprising the "community selected by the trustees at the date of the death "of the testator. It is given to them for the benefit of the "community." Kitto J. reached the same conclusion. He thought that the selected Order would take the gift immediately and absolutely and could expend immediately the whole of what it received. "There is," he said, "no attempt to create a "perpetual endowment." A different view was taken by the Chief Justice and McTiernan J. After an exhaustive examination of the problem and of the relevant authorities they concluded that the provision made by clause 3 was intended as a trust operating for the furtherance of the purpose of the Order as a body of religious women or, in the case of the Christian Brothers, as a teaching Order. "The membership of any Order chosen," they said, "would be indeterminate and the trust was intended "to apply to those who should become members at any time. "There was no intention to restrain the operation of the trust "to these presently members or to make the alienation of the "property a question for the Governing Body of the Order chosen "or any section or part of that Order." They therefore held that unless the trust could be supported as a charity it must fail.

The brief passages that have been cited from the judgments in the High Court sufficiently indicate the question that must be answered and the difficulty of solving it. It arises out of the artificial and anomalous conception of an unincorporated society which, though it is not a separate entity in law, is yet for many purposes regarded as a continuing entity and, however inaccurately, as something other than an aggregate of its members. In law a gift to such a society simpliciter (i.e., where, to use the words of Lord Parker in *Bowman* v. *Secular Society Ltd.*,[3] neither the circumstances of the gift nor the directions given nor the objects expressed impose on the donee the character of a trustee) is nothing else than a gift to its members at the date of the gift as joint tenants or tenants in common. It is for this reason that the prudent conveyancer provides that a receipt by the treasurer or other proper officer of the recipient society for a legacy to the society shall be a sufficient discharge to executors. If it were not so, the executors could only get a valid discharge by obtaining a receipt from every member. This must be qualified by saying that by their rules the members might have authorised one of themselves to receive a gift on behalf of them all.

It is in the light of this fundamental proposition that the statements, to which reference has been made, must be examined. What is meant when it is said that a gift is made to the individuals comprising the community and the words are added "it is given to them for the benefit of the community"? If it is a gift to individuals, each of them is entitled to his distributive share (unless he has previously bound himself by the rules of the society that it shall be devoted to some other purpose). It is difficult to see what is added by the words "for the "benefit of the community." If they are intended to import a trust, who are the beneficiaries? If the present members are the beneficiaries, the words add nothing and are meaningless. If some other persons or purposes are intended, the conclusion cannot be avoided that the gift is void. For it is uncertain, and beyond doubt tends to a perpetuity.

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[3] [1917] A.C. 406, 437; 33 T.L.R. 376.

The question then appears to be whether, even if the gift to a selected Order of Nuns is prima facie a gift to the individual members of that Order, there are other considerations arising out of the terms of the will, or the nature of the society, its organisation and rules, or the subject-matter of the gift which should lead the court to conclude that, though prima facie the gift is an absolute one (absolute both in quality of estate and in freedom from restriction) to individual nuns, yet it is invalid because it is in the nature of an endowment and tends to a perpetuity or for any other reason. This raises a problem which is not easy to solve, as the divergent opinions in the High Court indicate.

The prima facie validity of such a gift (by which term their Lordships intend a bequest or demise) is a convenient starting point for the examination of the relevant law. For as Lord Tomlin (sitting at first instance in the Chancery Division) said in *In re Ogden*,[4] a gift to a voluntary association of persons for the general purposes of the association is an absolute gift and prima facie a good gift. He was echoing the words of Lord Parker in *Bowman's* case[5] that a gift to an unincorporated association for the attainment of its purposes "may . . . be "upheld as an absolute gift to its members." These words must receive careful consideration, for it is to be noted that it is because the gift can be upheld as a gift to the individual members that it is valid, even though it is given for the general purposes of the association. If the words "for the general pur-"poses of the association" were held to import a trust, the question would have to be asked, what is the trust and who are the beneficiaries? A gift can be made to persons (including a corporation) but it cannot be made to a purpose or to an object:

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[4] [1933] Ch. 678; 49 T.L.R. 341.

[5] [1917] A.C. 406, 442.

so also, a trust may be created for the benefit of persons as cestuis que trust but not for a purpose or object unless the purpose or object be charitable. For a purpose or object cannot sue, but, if it be charitable, the Attorney-General can sue to enforce it. (Upon this point something will be added later.) It is therefore by disregarding the words "for the general purposes "of the association" (which are assumed not to be charitable purposes) and treating the gift as an absolute gift to individuals that it can be sustained. The same conclusion had been reached 50 years before in *Cocks* v. *Manners* [6] where a bequest of a share of residue to the "Dominican Convent at Carisbrooke (payable "to the Superior for the time being)" was held a valid gift to the individual members of that society. In that case no difficulty was created by the addition of words which might suggest that the community as a whole, not its members individually, should be the beneficiary. So also with *In re Smith.*[7] There the bequest was to "the society or institution known as the "Franciscan Friars of Clevedon County of Somerset" absolutely. Joyce J. had no difficulty in construing this as a gift individually to the small number of persons who had associated themselves together at Clevedon under monastic vows. Greater difficulty must be felt when the gift is in such terms that, though it is clearly not contemplated that the individual members shall divide it amongst themselves, yet it is prima facie a gift to the individuals and, there being nothing in the constitution of the society to prohibit it, they can dispose of it as they think fit. Of this type of case *In re Clarke* [8] may be taken as an example. There the bequest was to the committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks or in any other way beneficial to the Corps. The judge (Byrne J.) was able to uphold this as a valid gift on the ground that all the members of the association could join together to dispose of the funds or the barracks. He assumed (however little the testator may have intended it) that the gift was to the individual members in the name of the society or of the committee of the society. This might be regarded as an extreme case had it not been followed by *In re Drummond.*[9] In that case a testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion and to stand possessed of the proceeds upon trust for the Old Bradfordians Club, London (being a club instituted by Bradford Grammar School old boys), the receipt of the treasurer for the time being of the club to be a sufficient discharge to his trustees. By a codicil the testator declared that he desired that the said moneys should be used by the club for such purpose as the committee for the time being might determine, the object and intent of the bequest being to benefit old boys of the Bradford Grammar School residing in London or members of the club and to enable the committee, if possible, to acquire premises to be used as a club-house for the use of the members, with various other powers, including the founding of scholarships, as the committee for the time being should think best in the interests of the club or the school. Eve J. said that he could not hold, as the result of the will and codicil together, that the residuary gift to the Old Bradfordians Club was a gift to the members individually, but there was in his opinion a trust and there was abundant authority for holding that it was not such a trust as would render the legacy void as tending to a perpetuity. He cited only *In re Clarke*,[10] though other cases had been referred to in argument, and he ignored that Byrne J. had been able to reach his conclusion in that case just because he regarded the gift as a gift to the individual members of the corps who could together dispose of its assets as they thought fit. The judge added that the legacy was not subject to any trust which would prevent the committee of the club from spending it in any manner they might think fit for the benefit of the class intended. There was therefore a valid gift to the club for such purposes as the committee should determine for the old boys or members of the club. Their Lordships have thought it desirable to state *Drummond's* case [11] at some length both because it provides an interesting contrast to cases that will be referred to later and was itself an authority relied on by Farwell J. in *In re Taylor* [12] and by Cohen J. (as he then was) in *In re Price*.[13] In the former case the judge observed that *In re Clarke* [14] showed that a gift to a fund for a voluntary body of persons may be perfectly valid unless the rules governing that fund or the purpose for which the institution was created prevent the members from dealing with it, both capital and income, in any way they please. It does not appear that he was making any distinction between a gift to a voluntary body of persons and a gift to a fund for such a body. Two other cases had in the meantime been decided to which reference may be made. In *In re Prevost*[15] a testator had devised and bequeathed the whole of his residuary estate to the trustees of the London Library to be held by them upon trust for the general purposes of that institution, including the benefit of the staff. This case, too, came before Eve J., who held that the gift was valid upon the ground that it was a gift to the trustees of the library upon trust to be expended in carrying out the objects of the society according to its rules and that, inasmuch as there was nothing in the terms of the gift or in the rules of the library to prevent the expenditure of the corpus of the property, the gift did not fail for perpetuity. Here there was no question of a gift to an unincorporated society which was to be regarded as a gift to its individual members and capable of being dealt with by them as they should think fit. The judge nevertheless regarded it as falling within the class of case of which *Cocks* v. *Manners*[16] was the leading authority. Nearer to *Cocks* v. *Manners* and nearer too to the present case was *In re Ray's Will Trusts*.[17] In that case a testatrix, who was a nun in a convent, by her will gave all her property to the person who at the time of her death should be or should act as the abbess of the convent. The will was attested by two nuns belonging to the convent, one of whom was subsequently elected abbess and held that office at the time of the death of the testatrix. The substantial question was whether the gift was invalidated by section 15 of the Wills Act, 1937, and it was held not to be so invalidated because the gift was not to the abbess personally but in trust for and as an addition to the funds of the community. As to this Clauson J. made the following observations which state the point at issue[18]: "Another perfectly "lawful form of gift would be a gift of a legacy to the controlling "officer of a society in his capacity of officer, to be dealt with "as he would deal with other funds with which, as such officer "of a voluntary society, it would be his duty to deal. Again, "that would be a gift which the court will recognise as a good "gift, subject only to this point, which sometimes causes diffi"culty, that if the frame of the gift indicates that the legacy "is not to be used at once and immediately for the purposes "of the voluntary society, but is to be set aside and invested "and the income only to be used, the capital being preserved "as an endowment of the voluntary society, the court will not "give effect to the gift because it infringes the rule that no gift

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[6] (1871) L.R. 12 Eq. 574.

[7] [1914] 1 Ch. 937; 30 T.L.R. 411.

[8] [1901] 2 Ch. 110; 17 T.L.R. 479.

[9] [1914] 2 Ch. 90; 30 T.L.R. 429.

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[10] [1901] 2 Ch. 110.

[11] [1914] 2 Ch. 90.

[12] [1940] Ch. 481; 56 T.L.R. 588.

[13] [1943] Ch. 422; 59 T.L.R. 367; [1943] 2 All E.R. 505.

[14] [1901] 2 Ch. 110.

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[15] [1930] 2 Ch. 383; 46 T.L.R. 557.

[16] L.R. 12 Eq. 574.

[17] [1936] Ch. 520; 52 T.L.R. 446.

[18] [1936] Ch. 520, 524.

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"except a charitable gift is to be a perpetuity, and a gift thus "to endow a voluntary society necessarily creates a perpetuity."

The cases that have been referred to (and many others might have been referred to in the courts of Australia, England and Ireland) are all cases in which gifts have been upheld as valid either on the ground that, where a society has been named as legatee, its members could demand that the gift should be dealt with as they should together think fit; or on the ground that a trust had been established (as in *In re Drummond* [19]) which did not create a perpetuity. It will be sufficient to mention one only of the cases in which a different conclusion has been reached, before coming to a recent decision of the House of Lords which must be regarded as of paramount authority. In *Carne* v. *Long* [20] the testator devised his mansion-house after the death of his wife to the trustees of the Penzance Public Library to hold to them and their successors for ever for the use, benefit, maintenance and support of the said library. It appeared that the library was established and kept on foot by the subscriptions of certain inhabitants of Penzance, that the subscribers were elected by ballot and the library managed by officers chosen from amongst themselves by the subscribers, that the property in the books and everything else belonging to the library was vested in trustees for the subscribers and that it was provided that the institution should not be broken up so long as 10 members remained. It was urged that the gift was to a number of private persons and there were in truth no other beneficiaries. But Campbell L.C. rejected the plea in words which, often though they have been cited, will bear repetition [21]: "If the devise had been in favour "of the existing members of the society, and they had been at "liberty to dispose of the property as they might think fit, then "it might, I think, have been a lawful disposition and not tending "to a perpetuity. But looking to the language of the rules of "this society, it is clear that the library was intended to be a "perpetual institution, and the testator must be presumed to "have known what the regulations were." This was perhaps a clear case where both from the terms of the gift and the nature of the society a perpetuity was indicated.

Their Lordships must now turn to the recent case of *In re Macaulay's Estate*, which appears to be reported only in a footnote to *In re Price*.[22] There the gift was to the Folkestone Lodge of the Theosophical Society absolutely for the maintenance and improvement of the Theosophical Lodge at Folkestone. It was assumed that the donee, "the Lodge," was a body of persons. The decision of the House of Lords in July 1933, to which both Lord Buckmaster and Lord Tomlin were parties, was that the gift was invalid. A portion of Lord Buckmaster's speech may well be quoted. He had previously referred to *In re Drummond*[23] and *Carne* v. *Long*.[24] "A group of "people," he said, "defined and bound together by rules and "called by a distinctive name can be the subject of gift as well "as any individual or incorporated body. The real question is "what is the actual purpose for which the gift is made. There "is no perpetuity if the gift is for the individual members for "their own benefit, but that, I think, is clearly not the meaning "of this gift. Nor again is there a perpetuity if the society is at "liberty in accordance with the terms of the gift to spend both "capital and income as they think fit . . . If the gift is to be for "the endowment of the society to be held as an endowment and "the society is according to its form perpetual, the gift is bad: "but, if the gift is an immediate beneficial legacy, it is good." In the result he held the gift for the maintenance and improvement of the Theosophical Lodge at Folkestone to be invalid. Their Lordships respectfully doubt whether the passage in Lord Buckmaster's speech in which he suggests the alternative ground of validity: viz., that the society is at liberty in accordance with the terms of the gift to spend both capital and income as they think fit, presents a true alternative. It is only because the society, i.e., the individuals constituting it, are the beneficiaries, that they can dispose of the gift. Lord Tomlin came to the same conclusion. He found in the words of the will "for the maintenance and "improvement" a sufficient indication that it was the permanence of the Lodge at Folkestone that the testatrix was seeking to secure and this, he thought, necessarily involved endowment. Therefore a perpetuity was created. A passage from the judgment of Lord Hanworth M.R. (which has been obtained from the records) may usefully be cited. He said: "The problem may "be stated in this way. If the gift is in truth to the present "members of the society described by their society name so that "they have the beneficial use of the property and can, if they "please, alienate and put the proceeds in their own pocket, then "there is a present gift to individuals which is good: but if the "gift is intended for the good not only of the present but of

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[19] [1914] 2 Ch. 90.

[20] (1860) 2 De G.F. & J. 75.

[21] Ibid. 79.

[22] [1943] Ch. 422, 435.

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[23] [1914] 2 Ch. 90.

[24] 2 De G.F. & J. 75.

"future members so that the present members are in the position "of trustees and have no right to appropriate the property or its "proceeds for their personal benefit then the gift is invalid. It "may be invalid by reason of there being a trust created, or "it may be by reason of the terms that the period allowed by the "rule against perpetuities would be exceeded."

It is not very clear what is intended by the dichotomy suggested in the last sentence of the citation, but the penultimate sentence goes to the root of the matter. At the risk of repetition their Lordships would point out that, if a gift is made to individuals, whether under their own names or in the name of their society, and the conclusion is reached that they are not intended to take beneficially, then they take as trustees. If so, it must be ascertained who are the beneficiaries. If at the death of the testator the class of beneficiaries is fixed and ascertained or ascertainable within the limit of the rule against perpetuities, all is well. If it is not so fixed and not so ascertainable the trust must fail. Of such a trust no better example could be found than a gift to an Order for the benefit of a community of nuns, once it is established that the community is not confined to living and ascertained persons. A wider question is opened if it appears that the trust is not for persons but for a non-charitable purpose. As has been pointed out, no one can enforce such a trust. What follows? Ex hypothesi the trustees are not themselves the beneficiaries yet the trust fund is in their hands, and they may or may not think fit to carry out their testator's wishes. If so, it would seem that the testator has imperfectly exercised his testamentary power; he has delegated it, for the disposal of his property lies with them, not with him. Accordingly, the subject-matter of the gift will be undisposed of or fall into the residuary estate as the case may be. Their Lordships do not ignore that from this fundamental rule there has from time to time been a deviation: see, for example, *In re Dean*,[25] *In re Thompson*[26]: and that attempts have been made to explain or justify such cases (see, in particular, the fourth edition of Gray on the Rule against Perpetuities, pp. 776 et seq.). But the rule as stated in *Morice* v. *Bishop of Durham* (*per* Sir William Grant M.R.[27]) (*per* Lord Eldon L.C.[28]) continues to supply the guiding principle. It may be difficult to reconcile this principle with the decision of *Drummond's* case,[29] but the judge did treat that case as governed by *Cocks* v.

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[25] (1889) 41 Ch.D. 552; 5 T.L.R. 404.

[26] [1934] Ch. 342.

[27] (1804) 9 Ves. 399.

[28] (1805) 10 Ves. 522.

[29] [1914] 2 Ch. 90.

Manners[30] and, if so, must have assumed that when the will trustees had got the trust fund in their hands they could be compelled by the members of the Old Bradfordonians Club or of the school to apply it as they thought fit. But it is difficult to see how he made such an assumption or arrived at the conclusion that no perpetuity had been created. No similar difficulty arises in regard to the observations of Lord Buckmaster and Lord Tomlin which have already been cited. The effect is the same, whether the gift is to A, B and C or to a society consisting of A, B and C and no others, upon such terms that they can spend both capital and income as they think fit.

It is significant of the fine distinctions that are made in these cases that in *In re Price*[31] the judge, to whose attention *In re Macaulay's Estate*[32] had been called, held that a gift of a share of residue to the Anthroposophical Society in Great Britain "to "be used at the discretion of the Chairman and Executive Council "of the Society for carrying on the teachings of the founder, "Dr. Rudolf Steiner," was a valid gift.

Before turning once more and finally to the terms of the present gift, their Lordships must mention the case of *In re Cain, decd.*[33] In that case Dean J. has made an exhaustive examination of the relevant case law which must prove of great value in similar cases.

It must now be asked, then, whether in the present case there are sufficient indications to displace the prima facie conclusion that the gift made by clause 3 of the will is to the individual members of the selected Order of Nuns at the date of the testator's death so that they can together dispose of it as they think fit. It appears to their Lordships that such indications are ample.

In the first place, it is not altogether irrelevant that the gift is in terms upon trust for a selected Order. It is true that this can in law be regarded as a trust in favour of each and every member of the Order. But at least the form of the gift is not to the members, and it may be questioned whether the testator understood the niceties of the law. In the second place, the members of the selected Order may be numerous, very numerous perhaps, and they may be spread over the world. If the gift is to the individuals it is to all the members who were living at the death of the testator, but only to them. It is not easy to believe that the testator intended an "immediate beneficial legacy" (to use the words of Lord Buckmaster) to such a body of beneficiaries.

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[30] L.R. 12 Eq. 574.

[31] [1943] Ch. 422.

[32] [1943] Ch. 435.

[33] [1950] V.L.R. 382.

In the third place, the subject-matter of the gift cannot be ignored. It appears from the evidence filed in the suit that Elmslea is a grazing property of about 730 acres, with a furnished homestead containing 20 rooms and a number of outbuildings. With the greatest respect to those judges who have taken a different view, their Lordships do not find it possible to regard all the individual members of an Order as intended to become the beneficial owners of such a property. Little or no evidence has been given about the organisation and rules of the several Orders, but it is at least permissible to doubt whether it is a common feature of them, that all their members regard themselves or are to be regarded as having the capacity of (say) the Corps of Commissionaires (see *In re Clarke*[34]) to put an end to their association and distribute its assets. On the contrary, it seems reasonably clear that, however little the testator understood the effect in law of a gift to an unincorporated body of persons by their society name, his intention was to create a trust, not merely for the benefit of the existing members of the selected Order, but for its benefit as a continuing society and for the furtherance of its work.

Different views have been held upon the question whether the legal title remains in the will trustees after they have selected an Order. Kitto J. (expressly) and Williams and Webb JJ. (by implication) held that " when a body is selected by the trustees " the property will be at home " and will vest presumably in some authorised person or persons. (The Roman Catholic Charities Land Act of 1942 was not invoked in the High Court and becomes irrelevant if the chosen Order is not a charity.) The Chief Justice and McTiernan J. were of opinion that the trustees were intended, subject to the power of sale, to remain the repository of the whole legal title and to administer the trust by affording the enjoyment to the selected Order. The latter view is attractive if only because of the difficulty of transferring title when the above-mentioned Act does not apply. But their Lordships do not think it necessary for the purpose of this case to decide the question. No difficulty will arise if only a charitable body can be selected. If the choice is wider, the question will not arise. The dominant and sufficiently expressed intention of the testator is in their opinion (again in the words of Lord Buckmaster) that " the gift is to be an endowment of the society to be " held as an endowment," and that " as the society is according

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[34] [1901] 2 Ch. 110.

"to its form perpetual" the gift must, if it is to a non-charitable body, fail.

Their Lordships, therefore, humbly advise Her Majesty that the appeal should be dismissed, but that the gift made by clause 3 of the will is valid by reason only of the provisions of section 37 (D) of the Conveyancing Act, 1919–54, and that the power of selection thereby given to the trustees does not extend to Contemplative Orders of Nuns. The costs of all parties will be paid out of the estate of the testator. The costs of all the respondents will be taxed as between solicitor and clients.

Solicitors: *Waterhouse & Co.; Light & Fulton; Bell, Brodrick & Gray.*

C. C.

[HOUSE OF LORDS.]

INLAND REVENUE COMMISSIONERS . APPELLANTS;
AND
WOOD BROTHERS (BIRKENHEAD) LTD. . RESPONDENTS.

H. L. (E.)*
1958
Nov. 3, 4, 5;
Dec. 18.

Revenue—Income tax—Balancing charge—"Actual income"—Whether balancing charge part of "actual income" for company surtax purposes—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 245, 255 (3), 292, 323.
Revenue—Surtax—Company.

The taxpayer, a company to which section 245 of the Income Tax Act, 1952, applied, ceased trading on April 28, 1951, and went into voluntary liquidation on April 16, 1952. The period over which it had to be taxed was April 30, 1950, to April 16, 1952, inclusive. It was not disputed that a balancing charge of £18,675 fell to be made on the company in respect of sales of plant and machinery on cessation of its business under section 292 (1) and section 323 (4) of the Income Tax Act, 1952, and that the actual income of the company from all sources, as computed for the purposes of Chapter 3 of Part IX of the Income Tax Act, 1952, for the relevant period fell to be apportioned among the members under sections 245 and 248 of the Income Tax Act, 1952:—

Held (Viscount Simonds and Lord Keith of Avonholm dissenting), that the amount of the balancing charge did not fall to be included in the actual income from all sources for the purposes of Chapter 3 of Part IX of the Act; the sum of £18,675 was not "actual income" of the company within the meaning of section 245.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

Thomas Fattorini (Lancashire) Ltd. v. *Inland Revenue Commissioners* [1942] A.C. 643; [1942] 1 All E.R. 619 considered.

Kirkness v. *John Hudson & Co. Ltd.* [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345 considered.

Decision of the Court of Appeal [1958] Ch. 476; [1957] 3 W.L.R. 713; [1957] 3 All E.R. 314 affirmed.

APPEAL from the Court of Appeal (Jenkins, Parker and Pearce L.JJ.).

This was an appeal by leave of the House of Lords from an order of the Court of Appeal dated October 4, 1957, dismissing an appeal by the appellants, the Commissioners of Inland Revenue, from an order of the High Court (Harman J.) dated July 16, 1957, whereby an appeal by the appellants on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed and the determination of the commissioners was affirmed. The question was whether the subject-matter of a balancing charge imposed on the respondent company, Wood Brothers (Birkenhead) Ltd. (in liquidation) under section 292 of the Income Tax Act, 1952, constituted a part of the "actual "income" of the respondent company in respect of which a surtax direction could be made under section 245 of the Income Tax Act, 1952.

The facts, stated by Lord Reid, were as follows: The respondent company carried on business as wholesale grocers until April 28, 1951. On that date it sold its business and ceased to trade. Then on April 16, 1952, it went into voluntary liquidation. On March 11, 1955, the Special Commissioners of Income Tax, in pursuance of section 245 of the Income Tax Act, 1952, directed that for the purposes of assessment to surtax the actual income of the company from all sources for the period April 30, 1950, to April 16, 1952, should be deemed to be the income of the members of the company. It was admitted that the commissioners were entitled to give that direction for that period.

On the same day, March 11, 1955, the commissioners, in pursuance of section 248 (1) of the Act, apportioned the actual income of the company for that period among the members. They determined the amount of the actual income to be apportioned as £76,264. No objection was taken to the method of apportionment. The sole question in this appeal was whether the commissioners were entitled to take that sum as the actual income of the company for that period. That sum included a sum of £18,675, and the respondent contended that this sum was not part of the actual income of the company within the meaning of section 245 of the Act, and that the commissioners were therefore only entitled to apportion among the members the sum of £57,589. The respondent's contention was upheld by the Commissioners for the Special Purposes of the Income Tax Acts, who accordingly, on April 23, 1957, reduced the amounts apportioned to a total of £57,589. An appeal by the present appellants was dismissed by Harman J., and a further appeal was dismissed by the Court of Appeal.

The sum of £18,675 was the amount on which a balancing charge was made on the company under sections 292 and 323 of the Act in respect of its sales of plant and machinery on its ceasing to carry on business. It was admitted that this sum was correctly calculated and that the company was properly assessed in respect of it.

Sir John Senter Q.C., *E. B. Stamp* and *Alan Orr* for the appellants. The issue turns on the meaning of "income" in the Income Tax Act, 1952. It involves a close examination of only a few sections, particularly in Part X, and consideration of the structure of Part X. It is largely a matter of construction. The issue is novel.

In the last four-and-a-half years there have been three reported cases on balancing charges in the House of Lords: *Inland Revenue Commissioners* v. *Barr*,[1] *Madras Electric Supply Corporation Ltd.* v. *Boarland*[2] and *Kirkness* v. *John Hudson & Co. Ltd.*[3] The first turned wholly on the question of discontinuance.

It is common ground that the balancing charge fell to be made and that it was correctly computed at £18,675. But when the surtax direction was made there was an appeal on the ground that the £18,675 did not fall to be included in the "actual "income" of the company.

Surtax payable by an individual falls to be computed, assessed, charged, collected and paid as a deferred instalment of income tax: see section 2 (1) (*b*) and section 524 (4) and (5).

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[1] [1954] 1 W.L.R. 792; [1954] 2 All E.R. 218.

[2] [1955] A.C. 667; [1955] 2 W.L.R. 631; [1955] 1 All E.R. 753.

[3] [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345.

Company surtax comes in Part IX, headed "Surtax" generally; it is surtax which, in the ordinary way, in certain events, falls on a company such as this one by means of its apportionment among the members. The incidence of this is common ground in this case. Surtax is assessed on the members in the name of the company and, in the ordinary way, is payable by the company (section 249 (3)) or its liquidator (section 253 (2)). The income apportioned to a member is deemed for surtax purposes (a) to represent income from his interest in the company, and (b) falls to be included in the statement of his total income as the highest part thereof (section 249 (2)). The point for decision here is a company surtax point.

It is common ground that the actual income of the company, for a period which is not in dispute, as computed for the purposes of company surtax, fell to be apportioned. The House is not concerned with the question whether there was a reasonable distribution of the company's income, or even whether it was capable of distribution, provided it was income. The question is whether the subject-matter of a balancing charge imposed on the respondent company under section 292 constitutes a part of the company's "actual income" in respect of which a surtax direction can be made under section 245.

In *Thomas Fattorini (Lancashire) Ltd.* v. *Inland Revenue Commissioners*[4] there is direct authority as to the meaning of the expression "the actual income of the company." The Court of Appeal accepted the submission on that authority that "actual "income," as used in the Act, did not mean the real or true income, as opposed to the hypothetical or fictitious or notional income, but the income for the actual period in respect of which the assessment is made, as distinct from the income for some other basic period of a conventional kind. But the court held that the £18,675 was not income at all.

The judgments below proceeded on the basis that the only profits or gains of the trade for the actual period must be ordinary trading profits as wholesale grocers. The appellants have challenged this throughout.

While the company was trading, it received the benefit of income tax allowances year by year. These allowances were given, as directed by statute, in charging the profits or gains of the trade to income tax. When the company sold this plant the proceeds exceeded the written-down value for income tax purposes. Since the Income Tax Act, 1945, an amount equal to the excess has been used as a measure " in order to restore to " the public revenue the amount by which the past allowances " were shown to have been excessive ": see the *Kirkness* case.[5] This is done by means of an additional income tax assessment, when the amount of the excess appears, in charging the profits and gains of the trade (section 323 (4) of the Act of 1952).

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[4] [1942] A.C. 643, 658; [1942] 1 All E.R. 619.

It is common ground that the actual income of the company from the date to which the last accounts had been made up to the date of liquidation (April 30, 1950, to April 16, 1952), fell to be apportioned under the company surtax legislation.

The Crown's case is as follows: (1) The question is: Is this income? (2) " Income " in the Income Tax Acts is a statutory, not a philosophical, concept. (3) The Court of Appeal's reasoning on this point is wrong on construction and in not applying the authorities. (4) The view of the Court of Appeal, when analysed, must be either (a) that what Lord Macnaghten said in *London County Council* v. *Attorney-General*,[6] what Lord Dunedin said in *Whitney* v. *Inland Revenue Commissioners*,[7] and what Lord Atkin said in *Fattorini's* case[8] about income tax has no application to this case, or alternatively (b) that if these pronouncements do fall to be applied, the House of Lords could, or even should, have decided *Barr's* case[9] and the *Madras* case[10] differently (in the taxpayer's favour) on the ground that the sums charged and assessed to income tax were not income. The point was not taken.

The relevant portions of the Act of 1952 are sections 1, 122, 123, 292, 297, 301, 323 and 325. The relevant company surtax sections are sections 245, 253 (1) (*a*) and 255 (3).

The case stated shows that there was no question but that the £18,675, now said not to be income at all, fell to be charged under section 292 (1) and assessed under section 323 (4) to income tax and that the amount so charged and assessed was correctly computed. There is no issue, as in some surtax cases, as to reasonableness. The only question is whether the sum of £18,675 is in the same position (as part of the actual income) as the other sum directed and apportioned, the £57,589. The £18,675, although sometimes referred to as " the balancing charge "

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[5] [1955] A.C. 696, 716.

[6] [1901] A.C. 26, 35; 17 T.L.R. 131.

[7] [1926] A.C. 37, 52; 42 T.L.R. 58.

[8] [1942] A.C. 643.

[9] [1954] 1 W.L.R. 792.

[10] [1955] A.C. 667.

(which is a liability) is in fact, in the issue between the parties, the subject-matter of the balancing charge, the sum on which the charge falls.

The Court of Appeal rejected the reasoning of Harman J., which was wrong for the reasons given by Jenkins L.J., and the Crown's argument is not wrong for any of the reasons given by Harman J.

The effect and purpose of the balancing charge is to take the exact amount of the past trading profits, not hitherto included in the charge to tax because of the allowance, and bring them into charge to tax under the balancing charge assessment, at the time when their hoarding is seen in fact to be unmerited, as pristine profits or gains of the trade, charged and assessed in the later period of assessment. That is what happened here. The £18,675 is " income tax income " of the period.

Lord Howard de Walden v. *Inland Revenue Commissioners* [11] is distinguishable. The point about " actual income " was not in issue.

If the respondent company had not been a trader this question could never have arisen. Because it was a trader it received capital allowances, but for which a balancing charge could never have been made.

The Crown's submissions are:

(1) The £18,675 is income under the Act. Income tax is a tax on income, and the phrase " profits or gains " under Case I of Schedule D is a synonym for " income " in the Act. " Income " under the Income Tax Acts means a sum thereby charged to income tax and measured in accordance therewith. The sum of £18,675 bears all these characteristics. Section 292 fixes liability to income tax on this sum of £18,675 as income of the company; the Court of Appeal is wrong in its view that some further or other legislation is needed to designate that sum as, or deem it to be, income: see *Whitney* v. *Inland Revenue Commissioners*.[12] Section 292 is important as a charging section.

(2) The object of the legislature in imposing balancing charges on traders is to restore to the public revenue, by income tax assessments, the amounts by which past depreciation allowances for income tax have been shown to be excessive, and that object has been achieved under the Act. The Court of Appeal was right in holding that " actual income from all sources " means the

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[11] [1948] 2 All E.R. 825; 30 T.C. 345.

[12] [1926] A.C. 37, 52; 42 T.L.R. 58.

income for the actual period and does not bear the restrictive meaning attributed to it by Harman J.

(3) The suggested alternative of re-opening past assessments would defeat a main object of Part X or would be administratively impracticable.

As to submission (1), this is " income tax income " or income under the Act, because it is charged to income tax as profits or gains of the trade. There are two relevant statutory concepts, (a) charging and (b) computation. The starting point is that the company carried on a trade in the United Kingdom until April 28, 1951. The profits or gains were chargeable to income tax under Case I of Schedule D. The charge on trading profits arose under Case I of Schedule D in the ordinary way. The normal way of computing such profits or gains is the preceding year of assessment or accounting period ending in it, save where the commencement or cessation provisions apply. Here the trade was being carried on at April 6, 1951, but ceased on April 28, 1951, so that the cessation provisions applied. These provide for computation on an actual basis for that year of assessment (1951–52)—in fact the actual period which is made the basis period for the balancing charge, April 6 to April 28, 1951 (sections 130 (1) (*a*), 145 (2) and 325 (2)). Ordinarily in the second year of assessment the profits are computed on the results of the first 12 months' trading. This is quite arbitrary. So there is nothing odd in providing in the Act that the measure for computation of the profits and gains of the trade for the terminal period, as assessed, should be not only the quantum of the trading profits or gains, if any, arising in the actual period, but should also embrace an amount equal to (which is what the Act says) the past excess allowances on the plant made the subject of an additional assessment. The Act provided that these allowances are profits or gains of the trade of the actual period. They were assessed accordingly. Section 292 (3) and (4) are comprehensive provisions. The amount computed has been effectively charged to income tax so as to make it income in an income tax sense: see section 292 (1) and (3). The Act was passed to levy and collect a tax on income, a purely statutory concept which takes a variety of forms within that concept.

The relevant provisions in the Act of 1952 are sections 1, 3, 20, 47, 122, 123 and 126. Those in the Income Tax Act, 1918, are section 1, and the rules applicable to Cases I and II of Schedule D, rules 1, 3 and 6. In the Act of 1952 the sections bearing on the deductions allowable in computing the profits of a trader and the allowances deductible in assessing the profits once computed are sections 127, 130 (1) (*a*), 137, 280, 292, 301, 302, 303, 323 and 328. The provisions imposing or relating to charge are sections 1, 122 (2), 123 (3) and 292 (1) and (3); the provision relating to computation is section 292 (3); the provisions relating to assessment are sections 292 (1) and 323 (4).

The Court of Appeal misconstrued Part X in relation to the Act as a whole and, in particular, sections 323 and 325. The provisions in Part X imposing the balancing charge are completely enmeshed with the other provisions of the Act for charging, computing and assessing the profits or gains of a trade. The sum of £18,675 was " income tax income " and therefore " actual income." As to section 323, the concepts of computation and charging are distinguishable and are meticulously separated in the Act. It is submitted: (a) Jenkins L.J. was misled by the deceptive word " deduction " in section 323 (1). (b) In this particular context (though not elsewhere) it means, not a subtraction but an allowance—allowed after the profits have been computed in order to arrive, not at the profits, but at the net sum chargeable to tax. (c) The converse here in section 323 (4) is not in fact an addition to profits, as a step in computation, but a charge to income tax on the profits as computed under section 292 (3) and (4). (d) The common feature in section 323 (1) and (4) is in fact the phrase " in charging " (as contrasted with " in computing ") the profits or gains of the trade.

It is a wrong view of section 323 to regard it as mixing up allowances on charges under Part X with the profits of a trade as computed, or to regard it as being concerned with the computation of profits at all: see section 323 (6).

Further, it is wrong, as a matter of construction of a taxing Act, to draw from a mere machinery provision a leading conclusion as to whether or not an amount comes within the statutory concept of income charged under the Act.

The basis period (for the purposes of the balancing charge assessment to income tax at the standard rate) is April 6 to 28, 1951, which is embodied in the relevant period for the purposes of the surtax direction and apportionment, April 30, 1950, to April 16, 1952.

The scheme of Part X is to be found in its adaptation from rule 6 in the Act of 1918, and its symmetrical treatment, so far as possible, of allowances and charges is consequential on that adaptation. Because of this symmetry, statutory provisions as to allowances (*e.g.*, section 324) cast light on the position of charges. Section 270 (6) (*c*) is not sui generis, except only in so far as it is only under that heading of classes of income that the point arises. Note the words " income which is the subject " of a balancing charge under this Chapter."

The appropriate computation provision under section 255 (3) is section 292 (3) and (4), read in the light of the previous submissions as to construction. The references to surtax in the Act are in sections 2 (1) (*b*), 229 (1) and (2), 231, 245, 248 (1), 249 (2) and (3), 255 (3) and 524 (4) and (5). Having regard to the statutory provisions, taken as a whole, the correct computation for the amount in question, although it is made profits or gains of the trade, is in section 292 (3) and (4). The provisions as to computation in Part V are inapt for this purpose.

As to submission (2), the predominant fact is that the provisions in question, in particular in Part X, occur in a taxing Act; the only relevance of the policy of the statutory provisions can be as a step in following the scheme of those provisions as enacted, and the only purpose of the calculation in respect of a measured sum (in the present case admittedly correctly computed, charged and assessed) is to arrive at an amount of income tax payable by virtue of the assessment authorised by the charge. Having regard to the definition of " actual income of the company " from all sources " accepted by the Court of Appeal, it follows that income for the purposes of income tax at the standard rate is income for the purposes of surtax—" income tax income." The sum in question is income of the company because it is so dealt with under the provisions as to charge, computation and assessment as profits or gains of the trade.

As to submission (3), no question of reopening past assessments of the profits, as computed, could arise, because the allowances to be withdrawn had been given in charging the profits. The question is not what might have been done, but what the Act provides: *Inland Revenue Commissioners* v. *John Dow Stuart Ltd.*[13] Further, unless some special provision were made (which there is no justification for assuming), withdrawing the excessive allowances by reopening past assessments and making the adjustment year by year would defeat a clear object of Part X. It is clear from the definition of " annual allowance " in section 303 that the purpose of what originated in the Income Tax Act, 1945, is to make provision for restoring to the public revenue

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[13] [1950] A.C. 149, 164; [1950] 1 All E.R. 1.

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wear and tear allowances that had been made under the old rule 6 of the Act of 1918. Now, the ordinary rule as regards additional assessments is that there is a time limit of six years under section 47 (1). It is true that there is no time limit in cases of fraud or wilful default, but assessments to restore excessive allowances to the public revenue should not be so classed. Adjustments year by year limited to the ordinary six years would defeat the object of the Act. Also such an arrangement would be inconvenient both for the Revenue and the taxpayer, since each item of machinery has its own depreciation history for income tax purposes, and every time a company sold a single piece of machinery its past assessments would have to be reopened to make the adjustment. What the legislature has done by means of an assessment in respect of the basis period when the excess arises, is to bring into charge to income tax the amount of the profits or gains.

Glenboig Union Fireclay Co. Ltd. v. *Inland Revenue Commissioners* [14] is sufficiently referred to by Jenkins L.J. in the Court of Appeal. *Townsend* v. *Electrical Yarns Ltd.*[15] was dealing with a different point, the computation of trading profits for the purposes of section 130 (1). As to the scheme of the Income Tax Acts, see *London County Council* v. *Attorney-General* [16] and *Whitney's* case.[17] As to balancing charges, see the *Madras* case [18] and the *Kirkness* case.[19]

The steps leading to the appellants' conclusion are as follows: (a) The question is whether the sum of £18,675 is income of the company under the Act. (b) It was correctly charged, computed and assessed to income tax at the standard rate. (c) The scheme of the company surtax legislation is to treat certain companies (of which this is admittedly one) as a quasi-partnership and to direct and apportion their income in accordance with the respective interests of the members in certain events, also admitted here. (d) If the respondent company had been an individual, either a sole trader or in partnership, the assessment of this amount to income tax at the standard rate would have been final and conclusive for surtax: section 524 (4).

E. B. Stamp following. It is important to bear in mind the distinction made in section 292 (3) when coming to the machinery sections later on. For the purposes of tax the amount in question here is income. The machinery can only work if the amount on which the balancing charge is assessed is income from a source. Income tax is an assessed tax imposed annually, and all that the Finance Acts say is that income tax for the current year shall be so many shillings in the pound. Section 1 of the Income Tax Act, 1952, is the link with the annual Finance Acts. Unless the sum which is the subject of the balancing charge is within Schedule D no tax on it could be recovered. Therefore, it must have been intended to make it part of the trading income for the year in question, the only way of bringing it within Schedule D. *Fattorini's* case [20] is authority for the proposition that " actual " in this context has no significance except as defining the period with which one is concerned. If " actual " income " meant something different from income in an income tax sense, one would be on an uncharted sea.

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[14] 1922 S.C.(H.L.) 112; 12 T.C. 427.

[15] [1952] 1 T.L.R. 728; [1952] 1 All E.R. 918.

[16] [1901] A.C. 26, 28, 29, 33–38, 40, 41–46, 47–48.

[17] [1926] A.C. 37, 50, 52, 55.

[18] [1955] A.C. 667, 686, 692.

[19] [1955] A.C. 696, 706, 716, 723, 729–730, 736.

F. Heyworth Talbot Q.C., *Philip Shelbourne* and *M. Nolan* for the respondent company. Directions given pursuant to the provisions of section 245 of the Income Tax Act, 1952, are in respect of " actual income " and the subject-matter of a balancing charge is not income, nor (assuming it is income) is it " actual " income."

One must distinguish the case where there is a non-taxable accretion to a company's funds (" capital profit," as it is called) from the case where there is no non-taxable profit.

In 1945 there was a revolution in income tax law in the sense that then for the first time provision was made for a charge in respect of what was considered to be excessive allowances in relation to plant, machinery, buildings and the like. There was an entirely new scheme for charging something in respect of assets for which excessive allowances had been made. It charged something of a character never before subjected to tax.

Under section 245 of the Act of 1952 it is unreasonable to require the distribution of something which is not there.

The appellants contend that everything which is subject to a charge to income tax is income and support it by reference to section 1, the charging section, and to Lord Macnaghten's words in *London County Council* v. *Attorney-General*,[21] but when he was speaking of income tax he had a narrower scope than that to be considered since 1945. There was then nothing within the scope of the charge to income tax of which it could be said that it was not in its real nature income. But now income tax is in some instances chargeable on sums having the nature of capital receipts—for example, sums received for the sale of patent rights: see section 318. Under Schedule A the annual value could fairly be regarded as income and the same was true of Schedule B. The other Schedules present no difficulty. At that time it was true that everything to which income tax extended was fairly to be regarded as income in every proper sense of the expression. This appears from other observations in *London County Council* v. *Attorney-General*,[22] in which case there was no question of any set-off. In 1907 the council tried to go a step further: *Attorney-General* v. *London County Council*.[23] See also Finance (No. 2) Act, 1945, and section 318 of the Income Tax Act, 1952, with which section 330 links up. The appellants' proposition is that everything that falls within the scope of income tax is income. Here is a charge on capital sums—a clear case of something charged to income tax which can by no proper use of the term be described as income. This goes far to defeat the appellants' general proposition.

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[20] [1942] A.C. 643.

[21] [1901] A.C. 26, 35.

The provisions relating to profits tax (formerly national defence contribution) may be considered. Its basis was that the tax was to be charged, not by reference to the year of assessment, but by reference to the profits of an accounting period. Those profits were to be computed on income tax principles; that is, for the purposes of Schedule D. See section 20 (2) of the Finance Act, 1937. In the Finance Act, 1947, Parliament dealt with the effect of capital allowances and charges. See section 46 and Schedule VIII, Parts I and II. Parliament found it necessary to make an express provision that in relation to profits tax a balancing charge should be brought into the computation of profits. This would have been unnecessary if they were already profits in their nature.

Section 337 (2) (*b*) of the Income Tax Act, 1952 (which succeeds section 29 of the Finance Act, 1944), is in striking contrast with other provisions. It is in contrast with the way balancing charges are dealt with in section 292.

In 1945 there was a general review of depreciation allowances. It was natural that Parliament should hark back to the limited provisions already existing in rule 6. Wear and tear allowances originated in 1878, when the community had settled down to income tax as being a permanent feature of the national life. Profits were calculated in the ordinary way on a three-year average without regard to depreciation. The wear and tear allowance was for the year of assessment and was such as the commissioners thought just and reasonable. Section 337 of the Act of 1952 could not have come within the scope of rule 6. Until 1945 wear and tear allowances were made year by year and sometimes they were excessive. In 1945 for the first time means were provided for taking back excess allowances. Although these items form a subject-matter of a charge called income tax, they are essentially items of a capital nature. See sections 45 and 46 of of the Income Tax Act, 1945, and section 255 (3) of the Income Tax Act, 1952.

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[22] [1901] A.C. 26, 33, 34, 44.

[23] [1907] A.C. 131; 23 T.L.R. 390.

On the question whether the sum in question is "income," the respondents adopt what was said by Jenkins L.J. in the Court of Appeal.[24]

As to section 270 (6), it is conceded that so far as it goes, it is against the respondents. There the draftsman of the Act was clearly thinking of a balancing charge as income, but it is the only instance in the Act which in terms suggests it.

Section 323 (4) suggests that the sum in question is not part of the company's income for the purposes of section 245, since it levies the balancing charge by an assessment on profits and gains additional to any other assessment on profits and gains. Thus the sum cannot be income from any source recognised as giving rise to an income tax liability.

Further, section 337 helps the respondents since it expressly provides that certain proceeds from the sale of an asset representing scientific research of a capital nature are to be treated as trading receipts.

The second branch of the case is whether, assuming that the subject-matter of a balancing charge is "income," it is or is not "actual income." Actual income means income which in some real sense is capable of distribution. The whole tone of the relevant section shows that it is looking at actuality to prevent avoidance of surtax by failure to make a reasonable distribution: see *Lord Howard de Walden's* case.[25] Because actual income means in a broad sense distributable income the annual value under Schedule A must in a very real sense come into the computation of annual income. What Harman J. said sums up the respondents' argument on this point.[26]

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[24] [1958] Ch. 476, 496, 499, 503; [1957] 3 W.L.R. 713; [1957] 3 All E.R. 314.

[25] [1947] 2 All E.R. 502, 509; 30 T.C. 345, 363; (H.L.) [1948] 2 All E.R. 825, 826–831; 30 T.C. 345, 364–370.

Philip Shelbourne following. Section 292 deals with balancing allowances and balancing charges and section 325 defines "basis "period."

Profits tax is very close to surtax directions. If the appellants were right, there would be a charge to tax which could not be made effective. There is not an admitted liability and the respondents rely on the absence of machinery to show the intention of the legislature. If the charge was clear the absence of machinery would not stand in the way of giving effect to it, but here the charge is not clear, and the absence of machinery shows that it was not intended.

The argument for the appellants on section 1 of the Income Tax Act, 1952, is wrong in limine. One does not have to look at section 1 in order to connect section 292 with the annual Finance Act: see section 13 of the Finance Act, 1952. The initial words of section 292 (1) are a "charge . . . shall . . . be made . . . for "the year of assessment." Thus an assessment can only be an assessment to income tax. Taking section 292 and section 323 (4) together, it appears that the charge is by way of assessment to income tax. One can go straight to section 13 of the Finance Act, 1952. Alternatively, in surtax one is not concerned with income tax as such in section 1. But neither in section 1 nor in section 2 is one dealing with "actual income," the subject-matter of this case and the whole ground of the dispute. See sections 248 and 249.

In the phrase "actual income" the word "actual" should be read as "de facto": see the *Fattorini* case.[27] The word "actual" contrasts with "theoretical": see also the case of *Lord Howard de Walden*.[28]

Sir John Senter Q.C. in reply. In the case last mentioned there was no question of income tax at the standard rate. What was said by Harman J. in the present case [29] indicates the issue as the respondents have chosen to present it. As to the argument on the charging section, see *Whitney's* case.[30]

It is agreed that there was a revolutionary change in 1945 and that for the first time a charge was made in respect of excessive allowances. But there is nothing novel so far as the present point is concerned.

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[26] [1958] Ch. 476, 485; [1957] 3 W.L.R. 713; [1957] 3 All E.R. 147.

[27] [1940] 3 All E.R. 657, 663; 24 T.C. 328, 342–343.

[28] [1948] 2 All E.R. 825, 831; 30 T.C. 345, 369.

[29] [1958] Ch. 476, 482.

[30] [1926] A.C. 37, 55.

Surtax is a tax on individuals at a graduated rate appropriate to the individual. It is assessed on the company in the name of the member. For the individual's concern with surtax, see sections 2 (1) (*b*), 3, 231, 248, 249 (1) and (3), 249 (4) (*b*), 255 (2), 524 (1) (2) (4) and (5).

What Lord Macnaghten said in *London County Council* v. *Attorney-General*[31] cannot be dismissed as having been given on any narrow ground. He was making a pronouncement of general application. The sum here in question is made income by the statute within the spirit of what he said. See also the *Kirkness* case.[32]

Their Lordships took time for consideration.

December 18. VISCOUNT SIMONDS. My Lords, I am so fully in agreement with the opinion of my noble and learned friend, Lord Keith of Avonholm, that I can be very brief in stating my own views. Nor shall I occupy your Lordships' time in stating the many sections of the Income Tax Act, 1952, to which reference was made in the course of the argument. The Act contains over 500 sections and 25 Schedules. A considerable number of them were relied on by one side or the other. The question is in fact a very short one. It is whether the amount in respect of which a so-called balancing charge was properly made upon the respondent company under sections 292 (1) and 323 (4) of the Act was part of its actual income from all sources for the relevant period within the meaning of section 245 of the Act. If so, that amount was apportionable among the members of the respondent company, and the apportionment made by the Special Commissioners was properly made. But it has been held by Harman J. upon a case stated by the commissioners and, for different reasons, by the Court of Appeal, that the amount in question ought not to be regarded as part of its actual income for the period in question.

The argument was twofold: first, as was held by the Court of Appeal, that no statutory enactment provided that the amount on which the balancing charge was assessed should be deemed to be income of the company for income tax purposes; and, secondly, that, in any case, it was not part of the actual income of the company from all sources. If the first argument prevailed, the second argument was unnecessary: it was not suggested that the amount in question could be actual income of the company if it was not income at all.

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[31] [1901] A.C. 26, 35.

[32] [1955] A.C. 696, 712.

My Lords, it appears to me that the construction placed by the Court of Appeal upon the relevant sections of the Act is too narrow. The purpose of the balancing charge is not in doubt. I respectfully adopt the language of my noble and learned friend, Lord Morton of Henryton, in the recent case of *Kirkness* v. *John Hudson & Co. Ltd.*[1]: " Conversely, if the moneys received on the " sale were in excess of the written-down value of the asset, a " ' balancing charge ' was imposed, in order to restore to the " public revenue the amount by which the past allowances were " shown to have been excessive." The allowances were made in respect of the computation of profits or gains for purposes of income tax; the part of the public revenue affected was that which was derived from income tax, and the balancing charge is made in order to restore to that tax an amount by which it has been mistakenly reduced. Call it notional or artificial or what you will. It is an amount which, for the purpose of income tax, is as truly part of the subject's income as is, for instance, the notional or artificial amount which is under Schedule A regarded as his income. My noble and learned friend, Lord Keith of Avonholm, will exhaustively examine the relevant sections. I hope, therefore, I may not be thought to be wanting in respect to those who take a different view, if I say that, in my opinion, the solution of the problem lies in remembering that in the Act the word " income " has a special meaning, namely, a sum which is by the Act charged to income tax and measured in accordance with its provisions and that, specifically, where Case I of Schedule D is in question, " profits and gains " is an expression synonymous with " income." It is because the amount, on which the balancing charge is assessed, falls within that Case that it is brought into charge as income. I do not wish to elaborate what my noble and learned friend will say, but I cannot refrain from observing upon the incongruity of the conclusion to which, in the case of a company, the Court of Appeal has come with the result in the case of an individual trader. His surtax liability appears to be concluded by section 524 (4) of the Act. I agree, too, that no little weight should be attached to the language of section 270 (6) (*c*). In that subsection, quite naturally and, in my opinion, rightly, that

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[1] [1955] A.C. 696, 716; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345.

"which is the subject of a balancing charge under this Chapter" is called "income." So, in my opinion, it is for all the purposes of the Act.

But it remains to determine whether it is "actual" income within section 245. This expression is defined in section 255 (3). I do not think it necessary to look beyond its terms. It clearly has a purely temporal significance: it means income as defined, computed and measured by the Act but by reference to a particular period. That is in accordance with what Lord Atkin said in *Thomas Fattorini (Lancashire) Ltd.* v. *Inland Revenue Commissioners*,[2] and it is perhaps permissible to add that, if it means anything else, there is no guide to what it does mean.

I would only add that I agree with the observations of my noble and learned friend, Lord Morton of Henryton, upon what Lord Uthwatt said in *Lord Howard de Walden* v. *Inland Revenue Commissioners.*[3]

I would, therefore, allow this appeal, but, as I understand that the majority of your Lordships think otherwise, it must be dismissed.

Lord Morton of Henryton. My Lords, the parties in this case agree: (1) that a "balancing charge" was properly made upon the respondent company under sections 292 and 323 (4) of the Income Tax Act, 1952; (2) that "the amount on which the "balancing charge is made" was correctly computed, under the same provisions of that Act, at the sum of £18,675; (3) that on the true construction of the Act, once the amount on which the balancing charge is made has been ascertained, the balancing charge is income tax on that amount at the appropriate rate.

The one question which remains for decision is whether the sum of £18,675 already mentioned is or is not part of the "actual "income from all sources" of the respondent company for the relevant period, within the meaning of section 245 of the Act. If this question is answered in the affirmative, it follows that a direction and apportionment has been properly made under section 245, with the result that the members of the company are liable to pay any appropriate amount of surtax on the sums apportioned to them respectively.

Counsel for the company submitted, first, that the £18,675 was not "income" of the company within the meaning of section

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[2] [1942] A.C. 643; [1942] 1 All E.R. 619.

[3] [1948] 2 All E.R. 825; 30 T.C. 345.

245, and, secondly, that, if this sum could properly be described as income, it was not *actual* income within the meaning of the section.

My Lords, I would accept counsel's first submission.

I have had the pleasure of reading the speech which is about to be delivered by my noble and learned friend, Lord Reid. I entirely agree with his reasoning and conclusion, and I shall only add some observations upon certain passages in speeches delivered in this House which were much discussed in the course of the argument. In *Thomas Fattorini (Lancashire) Ltd.* v. *Inland Revenue Commissioners* [4] Lord Atkin said: "Actual "income does not mean the specific receipts that come in from "time to time, but the 'income tax income' as calculated at the "end of the year of assessment. To hold otherwise would make "nonsense of the section when applied to commercial companies, "who use their receipts as soon as they come in, and hardly "ever have left for distribution the actual incomings as sought "to be defined in the argument." In *Lord Howard de Walden* v. *Inland Revenue Commissioners* [5] Lord Uthwatt said: "My "Lords, for myself I am content to take the view that in light "of the context the words 'actual income' can mean only "income which is in some real sense capable of distribution. "Apart from that context, indeed, the phrase 'actual income' "is hardly apt to include fictional income, and non-existent "income composed of amounts deemed to be income is fictional "income." In each case these observations were directed to the words "actual income" in section 21 of the Finance Act, 1922, but the wording of that section does not differ in any material particular from the wording of section 245 in the Income Tax Act, 1952, and paragraph 6 of Schedule I to the Finance Act, 1922, is reproduced in section 255 (3) of the Act of 1952.

My Lords, when Lord Atkin, in *Fattorini's* case,[6] used the words which I have just quoted, he was dealing with an argument which had been pressed on the House by counsel for the appellant, and he was concerned only to reject the contention that "actual income" meant the specific receipts of the company. It would not be right to construe his words as an expression of opinion that every sum upon which income tax is payable is necessarily "actual income" within the meaning of the section, and unless his words can be so construed they do not assist the

[4] [1942] A.C. 643, 658.

[5] [1948] 2 All E.R. 825, 831; 30 T.C. 345, 370.

[6] [1942] A.C. 643, 658.

argument of counsel for the appellant in the present case. In the *Howard de Walden* case [7] Lord Uthwatt was dealing with a contention that where actual income from all sources of company No. 1 is attributed to company No. 2 as the result of an apportionment, that attributed income is part of the actual income from all sources of company No. 2, so that it could be further apportioned, under section 21 of the Finance Act, 1922, to the shareholders of company No. 2. In rejecting that contention, he pointed out, as did Asquith L.J. (as he then was) in the Court of Appeal, that if the contention were right, section 32 of the Finance Act, 1927, which provides for such sub-apportionment, would have been unnecessary. I do not think it would be right to treat the words of Lord Uthwatt which I have quoted as amounting to a decision on any question wider in its scope than the question with which he was dealing, and it is noteworthy that he did not refer in his speech to the provisions as to computing the "actual income" which were then contained in paragraph 6 of Schedule I to the Finance Act, 1922, and are now in section 255 (3) of the Income Tax Act, 1952.

I would dismiss the appeal.

LORD REID stated the facts and continued: My Lords, The question whether a sum on which a balancing charge is made is or is not part of "actual income" depends on the proper interpretation of the sections of the Act which deal with those matters; but it will, I hope, make my subsequent observations rather more intelligible if I first try to indicate in outline the apparent purpose of the Act in providing for balancing charges.

Before 1945 there was statutory provision for allowances for depreciation or wear and tear of plant and machinery under rule 6 of the rules applicable to Cases I and II of Schedule D. If one assumes values in money remaining stable, the amount of the allowances on any item ought to be such that, when the trader comes to sell it, the price which he receives is equal to the price which he paid for it less the aggregate amount of the allowances which he has received in respect of it. If on selling the item he receives more than that amount, then, neglecting the effect of inflation, it could be said that the allowances made to him had been too large, and, as these allowances had been deducted year by year before assessment of his trading profits, he had therefore paid too little in income tax. Before 1945 there was

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[7] [1948] 2 All E.R. 825; 30 T.C. 345.

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no provision in the Income Tax Acts which enabled the Revenue to recover anything from the trader when the price which he received on the sale of an item showed that the trader had benefited in the past at the expense of the Revenue by having been granted too large allowances. And in the converse case, where the price received on sale showed that past allowances had been too small, there was no provision to enable the trader to receive a further allowance.

To put this right was clearly one of the objects of the elaborate code enacted in the Finance Act, 1945, and now set out in Part X of the Act of 1952. "Balancing charges" were introduced to meet the case where the trader had received too large allowances in the past, and "balancing allowances" were introduced to meet the converse case. The provisions of the Act of 1952 are so elaborate that the scheme may appear more clearly if I only quote those parts of the sections which appear to me to be directly relevant in the present case. Balancing charges and allowances are first dealt with in section 292, which provides: "(1) Subject "to the provisions of this section, where any of the following "events occurs in the case of any machinery or plant in respect "of which an initial allowance or an annual allowance has been "made for any year of assessment to a person carrying on a "trade, that is to say, either—(*a*) the machinery or plant is sold, "whether while still in use or not; or . . . and the event in "question occurs before the trade is permanently discontinued, "an allowance or charge (in this Chapter referred to as 'a "'balancing allowance' or 'a balancing charge') shall, in the "circumstances mentioned in this section, be made to, or, as the "case may be, on, that person for the year of assessment in his "basis period for which that event occurs . . . (2) Where there "are no sale, insurance, salvage or compensation moneys or "where the amount of the capital expenditure of the person in "question on the provision of the machinery or plant still un-"allowed as at the time of the event exceeds those moneys, a "balancing allowance shall be made, and the amount thereof "shall be the amount of the expenditure still unallowed as afore-"said, or, as the case may be, of the excess thereof over the said "moneys. (3) If the sale, insurance, salvage or compensation "moneys exceed the amount, if any, of the said expenditure still "unallowed as at the time of the event, a balancing charge shall "be made, and the amount on which it is made shall be an "amount equal to the excess or, where the said amount still "unallowed is nil, to the said moneys: . . ." Subsection (4) then provides that in no case shall the amount on which a balancing charge is made exceed the aggregate of the allowances previously made to him in respect of the machinery or plant sold.

That section determines the amount on which a balancing charge is to be made. The way in which a balancing charge or a balancing allowance is made is provided by sections 301 and 323, of which the relevant parts are as follows:

"301.—(1) Any allowance or charge made to or on any person "under the preceding provisions of this Chapter shall . . . be "made to or on that person in charging the profits or gains of his "trade.

"323.—(1) Any claim by a person for an allowance falling "to be made to him under any of the provisions of this Part of "this Act in charging the profits or gains of his trade shall be "included in the annual statement required to be delivered under "this Act of the profits or gains thereof, and the allowance shall "be made as a deduction in charging those profits or gains. . . . "(4) Any charge falling to be made under any of the provisions "of this Part of this Act on a person for any year of assessment "in charging the profits or gains of his trade shall be made by "means of an assessment on the profits or gains of that trade "for that year of assessment in addition to any other assessment "falling to be made thereon for that year."

I must now set out section 245 of the Act, under which the commissioners gave their direction, and section 255 (3), which deals with the manner of computation of the actual income of the company—the question at issue in the present case. Those sections are as follows: "245. With a view to preventing the "avoidance of the payment of surtax through the withholding "from distribution of income of a company which would other-"wise be distributed, it is hereby enacted that where it appears "to the Special Commissioners that any company to which this "section applies has not, within a reasonable time after the end "of any year or other period for which accounts have been made "up, distributed to its members, in such manner as to render "the amount distributed liable to be included in the statements "to be made by the members of the company of their total "income for the purposes of surtax, a reasonable part of its actual "income from all sources for the said year or other period, the "Commissioners may, by notice in writing to the company, direct "that, for purposes of assessment to surtax, the said income of "the company shall, for the year or other period specified in the "notice, be deemed to be the income of the members, and the "amount thereof shall be apportioned among the members."

"255.—(3) In computing, for the purposes of this Chapter, "the actual income from all sources of a company for any year "or period, the income from any source shall be estimated in "accordance with the provisions of this Act relating to the computation of income from that source, except that the income "shall be computed by reference to the income for such year or "period as aforesaid and not by reference to any other year or "period."

With regard to the meaning of the phrase "actual income "from all sources," counsel referred to *Fattorini's* case [8] and the *Howard de Walden* case.[9] But the circumstances in those cases were quite different from those in the present case, and I can get little assistance from what was said by Lord Atkin in the former case and by Lord Uthwatt in the latter case. It appears to me that in the present case I must take section 255 (3) and determine whether, in making a computation of the actual income of the company from all sources in the manner there directed, the sum subject to the balancing charge does or does not fall to be included. If it does, then the appellants succeed, but if it does not, then this appeal must be dismissed.

Nothing turns in this case on the last part of this subsection, but this part of the subsection may afford an explanation of the choice of the word "actual" in the phrase "actual income" in this subsection and in section 245. This subsection was originally paragraph 6 of Schedule I to the Finance Act, 1922, which by section 21 first enacted the provisions which now form section 245 of the Act of 1952. In 1922 trading profits were still computed on a three years' average and the last part of this subsection then read "except that the income shall be computed "by reference to the income for such year or period as aforesaid "and not according to an average of more than one year or by "reference to any year or period other than such year or period as "aforesaid." So it is possible that the phrase "actual income" was there used to emphasise the fact that the income to be considered under section 21 was the income for a particular year and not income computed on a three years' average. But whether that be so or not, section 255 (3) in effect provides a definition of what is meant by "actual income": it directs how actual income is to be computed and, in my opinion, nothing can be included in actual income unless it can be brought within the words "income from any source . . . estimated in accordance "with the provisions of this Act relating to the computation of "income from that source."

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[8] [1942] A.C. 643.

[9] [1948] 2 All E.R. 825; 30 T.C. 345.

It was argued for the appellants that the sum made subject to the balancing charge was income and that its source was the trade carried on by the company. Even if that were so, the question would still arise—Was this sum income estimated in accordance with the provisions of this Act relating to the computation of income from the company's trade? The ordinary provisions relating to the computation of trading income are those which relate to Schedule D, Case I, and they have nothing to do with balancing charges. So it appears to me that the question then is this—Can the provisions of sections 292, 301 and 323 properly be regarded as provisions of the Act relating to the computation of income from trade? I do not wish to overstress what has so often been said in this House to the effect that no tax can be imposed on a subject without words in an Act clearly showing an intention to lay a burden on him. If it appears by clear implication that the provisions of these sections should be so regarded, that would, I think, be sufficient, and I shall therefore turn back to these sections to consider whether their terms afford sufficient ground for any such implication.

Section 292 deals with the computation of the sum on which a balancing charge is to be made. Three things are to be taken into account in the case of a sale of plant or machinery—the price originally paid for it, the price received for it on sale, and the aggregate of past allowances made in respect of it. The original cost less the past allowances is the "expenditure still "unallowed." The sum made subject to the balancing charge is not in any normal sense income. The machinery or plant with reference to which it is calculated was a capital asset, and the cost of acquiring it was capital expenditure. So far as I can see, the only way in which the sum made subject to the balancing charge is related to income in the ordinary sense is that it represents a part, or it may be the whole, of the allowances made in past years, and that in those years those allowances were brought in as deductions after profits had been computed so as to reduce the trader's taxable income. So it has a relation to the trader's taxable income in past years but no relation to his "actual "income" for the year in question. This section does not provide expressly or by clear implication that the sum on which a balancing charge is made is to be deemed to be, or to be treated as, a trading receipt, nor does it provide that it is to be part of or to be aggregated with the trading income for the year in question. So far as this section is concerned this sum is left to stand by itself.

This is in striking contrast with the provisions of section 337, which deals with a comparable matter, the sale of an asset representing scientific research expenditure of a capital nature. There it is provided by subsection (2) (*b*) that, if the proceeds of sale plus the allowances exceed the original cost, the excess or the amount of the allowances, whichever is the less, "shall be "treated as a trading receipt of the trade accruing at the time of "the sale." That provision was first enacted by the Finance Act, 1944, section 29, and it was therefore before the eyes of the draftsman and of Parliament when balancing charges were first introduced.

The other two sections on which the argument for the appellants was chiefly founded are sections 301 and 323. They must, I think, be taken together. They deal not with computation but with the method of assessment of the balancing charge. The former provides that the charge is to be made in charging the profits or gains of the trade, and this is expanded by section 323 (4), which provides that it is to be made by means of an assessment on the profits and gains and that this assessment is to be in addition to any other assessment thereon for the year.

To my mind, the question is whether these sections clearly designate the sum made subject to the balancing charge as part of the trading income for the year in question, or whether they merely provide, as a matter of machinery, that the balancing charge shall be charged and assessed as if it was a charge on that trading income. It is, I think, of some importance that the assessment by means of which the charge is made is to be separate from the assessment in respect of trading profits. If it was intended that the sum made subject to the balancing charge should be treated for all purposes as part of the trading income for the year in question, counsel were unable to suggest any reason why there should be this double assessment, and no reason occurs to me. Indeed, it would rather seem that the draftsman has deliberately avoided anything that could suggest that sums made subject to balancing charges are part of trading income for the year in question.

Then an argument was founded on section 1 of the Act. This section links the annual Finance Acts with the Income Tax Act by providing that tax at the rates there enacted shall be charged

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for each year in respect of all property, profits or gains described or comprised in the Schedules. It was argued that unless the sum made subject to a balancing charge could be said to be described or comprised in Schedule D—it could not be in any other Schedule—then no tax on it could be recovered. So it was said that the intention must have been to make this sum a part of the trading income for the year in question—the only way in which it could become comprised in Schedule D. I am not at all satisfied that that is so. I think that a sufficient link between a balancing charge and the annual Finance Acts could be found in the provisions of section 323 (4) that the charge shall be made by means of an assessment on the profits or gains of the trade for that year. An assessment for a particular year can only be at the rates enacted in the current Finance Act. And if the intention was not to enact that the sum made subject to a balancing charge is to be deemed to be income for all purposes, but merely to enact that for the particular purpose of this assessment it should be treated as if it were trading income of the year in question, then I think that those provisions were appropriate for that purpose.

Then it was argued that anything made subject to income tax must necessarily be income for all the purposes of the Act. Reference was made to the familiar passage in Lord Macnaghten's speech in *London County Council* v. *Attorney-General*[10] beginning: "Income tax, if I may be pardoned for saying so, is a tax "on income. It is not meant to be a tax on anything else." No doubt that was so in 1901. Apart from Schedule A everything that was taxed at that date was income in the ordinary sense, and if a landowner, instead of drawing income from rent, occupied his own property, he was enjoying money's worth of an income character. But now income tax is sometimes meant to be a tax on something which is not income. For example, section 318 charges income tax in certain circumstances on capital sums received for the sale of patent rights and it does so by making such sums chargeable under Case VI of Schedule D.

I do not think that much can be inferred from any general statement equating sums charged to income tax with income. For some purposes it may be convenient and not incorrect to do this. Counsel for the appellants attached importance to the fact that section 270 (6) (*c*) refers to "income which is the subject "of a balancing charge under this Chapter." The context there is that certain allowances are to be available primarily against "the following income," and then there are specified incomes taxed under Schedule A and certain income taxed under Schedule D, Case VI. This appears to be the only place in the Act where the word "income" is used in connection with sums made subject to balancing charges. The word appears to me to be used here as mere description and to signfy no more than that the sums in question are chargeable to income tax. But even if the use of the word "income" in this rather unimportant subsection had some general significance, it would not go to the real point in this case. The question in this case is not whether a sum made subject to a balancing charge is income in some general sense but whether it is actual income within the meaning of sections 245 and 255 (3). After a close examination of all the sections relied on, in light of the argument submitted for the appellants, I can find nothing sufficient to bring sums made subject to a balancing charge within the scope of the term "actual income" in section 245.

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[10] [1901] A.C. 26, 35; 17 T.L.R. 131.

My Lords, I fear that I have taken up much time with technical argument. I have done so because income tax is a highly technical subject. But if I took a broader view of the case, I should reach the same result. Under section 245 it is the commissioners' duty to determine whether the company has within a reasonable time distributed to its members a reasonable part of the income to which the section applies. One would therefore expect the section to apply to income which is in fact capable of distribution, and this expectation would be confirmed by the fact that the section purports to deal with "actual "income." It is true that when one comes to section 255 (3) one finds by its terms actual income can include some items which, although they are income in the sense in which Lord Macnaghten used the word, are not money in the hands of the company capable of immediate distribution. But it is a long step from that to find that the section also includes in actual income a new kind of subject which was not chargeable to income tax when the section was first enacted, and which is not income in any ordinary sense of the word. Of course, if Parliament has made it clear that the section is to apply, then the section must be applied, though it is not easy to see how the commissioners, acting reasonably as they must, could take such a sum into account in carrying out their duty under the section to consider whether a reasonable part has been distributed. This novel kind of "income" has been made chargeable to income tax, no doubt for good reasons. But I would not think that that fact raises any presumption that section 245 also applies to it. Regarding the whole matter in this way, far from finding any clear indication of an intention to bring these sums within the scope of section 245, I would not find it possible to reach that result without devious and dubious argument. I am, therefore, of opinion that this appeal should be dismissed.

LORD KEITH OF AVONHOLM. My Lords, we are concerned here with a direction and apportionment made by the Special Commissioners under sections 245 and 248 of the Income Tax Act, 1952, with reference to undistributed income of the respondent company, which went into voluntary liquidation on April 16, 1952. Much discussion has centred on the meaning of " actual income " in these sections. In my opinion, " actual " here has a temporal significance and relates to income from all sources for the year or period to which the direction relates and not to income computed by reference to any other year or period. This, I think, is clear from the language of section 255 (3) of the Act. The accounts of the company since April 29, 1950, had not been certified by the company's auditors prior to the liquidation, and it is common ground that the relevant period under consideration is April 29, 1950, to April 16, 1952, by reason of the terms of section 253 of the Act. Under that section the income of the company for that period is, for the purposes of section 245, deemed to be income available for distribution to the members of the company.

The short question in the case is whether money received by the company from the sales of certain plant and machinery in excess of the written-down value from allowances previously given for purposes of tax is income of the company for the relevant period within the meaning of sections 245 and 253 of the Act. The company sold its business and ceased trading on April 28, 1951. The plant and machinery was sold on the cessation of its business. It is common ground that in respect of this sale a balancing charge falls to be made on the sum of £18,675 under the provisions of sections 292, 301 and 323 of the Act of 1952. The year of assessment for the balancing charge is fixed by reference to the company's " basis period " for which the event occurred, in this case April 6 to April 28, 1951.

My Lords, it would seem that the income of the company from all sources means income of the company from any source brought into charge for income tax under the Act of 1952. The only source suggested in the present case is the trade of the company, the profits or gains of which are brought into charge under Schedule D. The Revenue say the subject-matter of the balancing charge, namely, £18,675, is such a profit or gain. The respondent company say it is not. This sum represents excess allowances that have been given to the company in previous years under the provisions of the Act of 1952, or previous Acts, including the Income Tax Act, 1918, making to traders allowances in respect of the capital cost of machinery and plant and which were given as deductions from profits and gains brought into charge for tax. Under the Act of 1918 no provision was made for recoupment to the Revenue if it should ultimately be found, on sale of an asset or otherwise, that an excessive allowance had been made, whereas under the present Act provision is made for such a case, in the shape of a balancing charge, and also, where it is found that too small an allowance has been given to the trader in past years, for giving him further relief in the shape of a balancing allowance. Section 292 of the Act is the section that provides the measure for computing the amount of the balancing allowance or the amount on which a balancing charge falls to be made. This section has been previously considered in this House and elsewhere, and I find it unnecessary to examine its provisions in further detail. It is agreed that the sum subject to the balancing charge, namely, £18,675, has been correctly computed. I would refer, however, to what have been called the relevant charging provisions of the Act, though they might more appropriately be called the relieving and charging provisions. Section 301 (1) says: " Any allowance or charge made to or on any person under " the preceding provisions of this Chapter shall . . . be made to " or on that person in charging the profits or gains of his trade." Section 323 (1) provides: " Any claim by a person for an allow- " ance falling to be made to him under any of the provisions of " this Part of this Act in charging the profits or gains of his trade " shall be included in the annual statement required to be " delivered under this Act of the profits or gains thereof, and the " allowance shall be made as a deduction in charging those profits " or gains." Subsection (2) provides for carrying forward the allowance or part thereof to succeeding years where the profits or gains of a year are insufficient to permit full effect being given to the deduction. Subsection (4) reads: " Any charge falling to " be made under any of the provisions of this Part of this Act on " a person for any year of assessment in charging the profits or " gains of his trade shall be made by means of an assessment on "the profits or gains of that trade for that year of assessment in "addition to any other assessment falling to be made thereon for "that year."

I pause at this point to ask, what is there that fixes the rate at which the balancing charge falls to be made on the profits or gains of the trade? There is nothing in the Act that fixes the rate expressly. It is, however, common ground that the rate is the standard rate of income tax for the basis period. I see no way of bringing in that rate except through section 1 of the Act, which applies the rate of income tax fixed by any Act for any year to all property, profits or gains of that year comprised in the Schedules to the Act of 1952. It is hardly necessary to refer to repeated observations in this House and elsewhere that income tax is a tax on income. And if a balancing charge is to be regarded as a tax on income, it is a short step to take to regard the amount on which it is levied as income arising, in the present case, from a transaction in the course of trade. If it is not income within one or other of the Schedules of the Act, I can see no authority for levying any rate of income tax on the amount computed as subject to a balancing charge. It is said that a change has taken place in the outlook of income tax legislation, and that all receipts which are subject to tax are not necessarily income receipts. It is true that a somewhat exceptional course seems to have taken place under section 318 of the Act in the case of the sale of patent rights for a capital sum. But a particular exception in the case of so special a matter as the sale of patent rights does not, in my opinion, detract from the general principle to which I have referred.

The scheme generally of the relevant statutory provisions seems to me to be to allow to be charged against the revenue side of a trading account depreciation in respect of wear and tear of capital assets, and on the sale or otherwise of these assets either to restore to revenue what has been found to have been unnecessarily charged for depreciation or to allow a further charge against revenue if it is found that insufficient depreciation has been allowed. I should not have thought that this would be contrary to sound commercial and accountancy principles, but whatever may be commercial or accountancy practice, I think the object of the Act was to secure that the subject-matter of the balancing charge should be treated as an income profit subject to tax and not as a capital profit free from tax. If this be so, then the sum of £18,675 should properly be regarded as a receipt credited to revenue, though arising out of a capital transaction, and as it would go to increase the profits and gains of the trade and arise out of the trade, it should form part of the income of the company for the purposes of section 245.

The weight of the argument for saying that this sum is not such income seems to rest on the language of section 323 (4), which levies the balancing charge by an assessment on profits and gains additional to any other assessment on the profits and gains. Any other assessment would include income tax under Schedule D. Therefore, so the argument would seem to run, this sum cannot be income from any source recognised as giving rise to a liability to income tax under the Act. This I find difficult. The more natural meaning, in my opinion, is that this is a supplementary assessment of the same nature and origin as the tax levied under Schedule D, and imposed because the subject-matter of the charge is regarded as an addition to the profits or gains of the trade. Thus we find a reason, difficult otherwise to explain, for fixing the rate of charge at the appropriate income tax rate for the basis period. Moreover, the balancing charge cannot be considered without reference to its correlative, the balancing allowance. The balancing allowance has the effect of reducing the amount of profits and gains brought into charge for tax. Is it to be said that the income of a company for the purposes of section 245 are the profits and gains before deduction of the balancing allowance? I think not. But the balancing allowance proceeds from the same kind of transaction as may give rise to a balancing charge. The considerations, in my opinion, are the same in each case. The balancing allowance results in a reduced assessment. In the case of a balancing charge an extra assessment is made and the result is the same as if a single assessment was made on the sum of the profits and gains plus the amount brought in as subject to a balancing charge. What has been allowed unnecessarily as a deduction from profits and gains for the purposes of tax is to be subject to the same kind of tax when brought back into account. In my opinion, the sum here in question is just an additional profit or gain of the company subject to tax under Schedule D of the Act.

I derive little assistance from various other sections of the Act which were referred to in the course of the hearing, and find in them nothing to militate against the view I have expressed. Some reliance was placed by the respondent on section 337 of the Act inasmuch as it expressly provides that certain proceeds from the sale of an asset representing scientific research expenditure of a capital nature shall be treated as a trading receipt of the trade. This argument I find somewhat double-edged. In any event, the section finds place in a separate Part of the Act, Part XI, devoted to "Relief for Expenditure on Scientific Research," and I should hesitate to draw any inference from Part XI in considering the effect of Part X of the Act. Of greater significance, in my opinion, is the reference in section 270 (6) (*c*) to "income which is the subject of a balancing charge under this "Chapter," which appears in the same Part of the Act as that covering allowances in respect of machinery and plant. Section 270 appears in Chapter I of Part X of the Act but Chapters I, II and III of Part X are all modelled on the same pattern and bring in balancing allowances and balancing charges which, in principle, differ in no material respect in any one of these chapters. The separation into chapters is due to the different nature of the assets dealt with and leads to the same results in each case.

Lastly, it may be noted that where an individual trader has been assessed to tax at the standard rate for any year of assessment, the assessment will be final and conclusive, under section 524 (4) of the Act, in estimating his total income. This would seem to be conclusive as to his surtax liability. It would be at least strange that where an individual's surtax liability emerged through his interest as a shareholder in a trading company under the surtax provisions of Part IX of the Act a different result should be reached.

On all considerations I am of opinion that the determination of the commissioners is wrong, and that the appeal should be allowed.

LORD SOMERVELL OF HARROW. My Lords, I agree with the opinions of my noble and learned friends, Lord Morton of Henryton and Lord Reid. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Simmons & Simmons for March, Pearson & Green, Manchester.*

F. C.

J. C.*

1958
Oct. 2.

MOHAMEDALI JAFFER KARACHIWALLA APPELLANT;

AND

NOORALLY RATTANSHI RAJAN NANJI AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Mortgage—Redemption and foreclosure—Order for sale—Whether mortgagee entitled to order for sale—Whether proviso for redemption in third mortgage "contract to the contrary"—Indian Transfer of Property Act, 1882 (*Act XIV of* 1882), *s.* 67.
Eastern Africa—Kenya.

By section 67 of the Indian Transfer of Property Act, 1882, as applied to Kenya: "In the absence of a contract to the contrary, "the mortgagee has at any time after the mortgage money has "become due to him and before . . . the mortgage money has been "paid . . . a right to obtain from the court . . . a decree that the "property be sold."

A mortgage deed of October 29, 1951, in respect of leasehold land in Mombasa provided, in effect, that the mortgagor was to pay to the mortgagee interest monthly on sums outstanding on the mortgage, and was to pay off the principal by instalments and at the dates specified in the deed; if the instalments were thus paid the debt would be repaid by June 30, 1968, and, if interest had been paid monthly in the meantime, the security was to be reconveyed by the mortgagee on or after that date. The deed also provided that if the mortgagor failed to observe any of the covenants in the deed the mortgagee was entitled to call in the principal then outstanding and apply to the court to enforce payment.

The mortgagor having defaulted in payment of principal and interest, an order for sale of the security was obtained from the court at the instance of the mortgagee. On appeal, the mortgagor contended that notwithstanding the breaches of covenant the proviso for reconveyance so long as the principal and interest were paid up by June 30, 1968, was a "contract to the contrary" within the meaning of section 67 of the Transfer of Property Act, 1882, and that he was entitled to his security on that date or thereafter if principal and interest had been paid by then:—

Held, that on construction the mortgage deed contained no "contract to the contrary" within the meaning of section 67. The terms of the deed itself negatived the idea that the mortgagee had in all circumstances to wait until June 30, 1968, before enforcing

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* *Present*: LORD RADCLIFFE, LORD TUCKER and the RT. HON. L. M. DE SILVA.

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

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his security. The rights and obligations created by the proviso for reconveyance were only binding so far as they were not rendered incapable of effect—as they were here—by an earlier assertion in the deed of the mortgagee's rights.

Williams v. *Morgan* [1906] 1 Ch. 804 distinguished.

Decision of the Court of Appeal for Eastern Africa affirmed.

APPEAL (No. 6 of 1957) from an order of the Court of Appeal for Eastern Africa (Worley P., Briggs and Bacon JJ.A.) (March 27, 1956), dismissing with costs an appeal by the appellant from the judgment of the Supreme Court of Kenya at Mombasa (Mayers J.) (November 11, 1954), and all proceedings subsequent thereto in an action (Civil Case No. 213 of 1953) wherein the respondent, Noorally Rattanshi Rajan Nanji (hereinafter called "the first respondent") was the plaintiff and the appellant and the respondents Ismailia Corporation Ltd. and Karmali Khimji Pradham (hereinafter respectively called "the second respondent" and "the third respondent") were the defendants. The action was begun by a plaint dated August 8, 1953, whereby the first respondent as third mortgagee under an indenture of mortgage (hereinafter called "the third mortgage") dated October 29, 1951, claimed judgment against the appellant for, inter alia: (1) Shs.163,874/94, being Shs.150,000/- principal sum under the third mortgage and Shs.13,874/94 interest thereon as set out in the third mortgage from February 1, 1952, to July 31, 1953; (2) further interest on the said principal sum of Shs.150,000/- at the rate of and in the manner set out in the third mortgage from August 1, 1953, till judgment; (3) order for the sale of the mortgaged premises if the appellant failed to pay the total decretal amount by a date to be fixed by the court; payment to the second respondent and the third respondent of the respective amounts due under their respective mortgages and payment to the first respondent of his decretal amount; (4) personal decree for balance (if any) after the realisation of the security in full.

The grounds of the present appeal were twofold: (a) that on the true construction of the third mortgage and of section 67 of the Indian Transfer of Property Act, 1882 (as applied to Kenya), the first respondent was not entitled to an order for the sale of the mortgaged property; and (b) that, even if he was, the order dated November 15, 1954, the preliminary decree for sale and the final decree for sale hereinafter mentioned were not in the form prescribed by the relevant provisions of the Indian Transfer of Property Act, 1882 (as applied to Kenya).

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The appellant was the lessee of three parcels of land situated on Mombasa Island. By an indenture dated October 29, 1951, the appellant mortgaged the three parcels in favour of the second respondent to secure repayment of the sum of Shs.84,000 together with interest thereon; by a second indenture of the same date he mortgaged the same three parcels, subject to the first mortgage, in favour of the assignor of the third respondent to secure repayment of a sum of Shs.21,623 together with interest thereon. By the third mortgage he mortgaged the same three parcels in favour of the first respondent, subject to the first and second mortgages, to secure repayment of the sum of Shs.150,000 together with interest thereon at the rate of 4 per cent. on the first Shs.100,000, 9 per cent. on the second Shs.25,000 and 12 per cent. on the third Shs.25,000.

The covenants in the third mortgage so far as relevant to this appeal were as follows: First, after recitals, the mortgagor (i.e., the appellant) covenanted to pay to the mortgagee (i.e., the first respondent) the sum of Shs.150,000 on June 30, 1968, together with interest computed as therein provided and he covenanted to pay such interest at the end of every month as it accrued due and payable. Then followed an assignment by the mortgagor to the mortgagee of the three parcels of land for the residues of their respective terms of years (except the last two days of each term) together with buildings then in course of erection and to be erected thereon. The mortgagor further covenanted with the mortgagee: "(b) During the term "of this mortgage and so long as any moneys remain due and "owing under these presents the mortgagor will pay all the "amounts whether for principal interest or otherwise due or to "fall due under the first and second mortgages . . . and also "pay the ground rent and all municipal rates and taxes and "all outgoings in respect thereof regularly. (d) To insure and "keep insured all buildings situate and to be erected on the land; ". . . (e) Should the mortgagor make any default in payment "of the ground rents, municipal rates and taxes, insurance and "payments of premium or premia in respect thereof or should "he fail to pay interest regularly and punctually to the mortgagee "under the first and second mortgages or should he fail to "pay the interest due on the principal sum or sums advanced "regularly as hereinbefore provided or should he fail to carry "out any of the covenants and conditions and agreements herein "contained then in any one of such cases the mortgagee shall be

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" at liberty to demand the repayment of the principal sum together with all interest due thereon notwithstanding the time " for repayment thereof hereinbefore provided and shall be entitled to recover the same through a court of law: Provided " always that the mortgagee shall not enforce his right to claim " and recover the whole principal sum in event of any of the " above defaults until after January 1, 1952, and even after " the said date until after a five-week previous written notice " is first given by the mortgagee to the mortgagor demanding " the compliance of any default or breach as aforesaid. . . . " (f) He the mortgagor agrees that he will repay the sum of " Shs.150,000 (Shillings one hundred and fifty thousand) to be " advanced hereunder by twenty-five half yearly instalments of " Shs.5,000 (Shillings five thousand) the first of such half " yearly instalments to be paid on June 30, 1952, and the " remaining twenty-four at the end of every six months and " thereafter the balance by eight half yearly instalments the " first seven instalments of Shs.3,000/– (Shillings three thousand) " each and the eighth instalment of Shs.4,000 (Shillings four " thousand) thus paying off the whole amount by June 30, 1968, " as hereinbefore provided. . . ."

The provision for redemption in the third mortgage was as follows: " (h) The mortgagee hereby covenants with the mortgagor that if the mortgagor shall repay the total principal sum " advanced under these presents together with interest thereon " due as hereinbefore provided by June 30, 1968, the mortgagee " will at any time thereafter after the expiry of the stipulated " date at the request and cost of the mortgagor reassign and " surrender the lands and all buildings to the mortgagor as he " the mortgagor may direct."

The appellant made default in payment of the principal sums and interest due under the first and second mortgages and failed to pay the ground rent and municipal rates in respect of the mortgaged property and also failed to pay the requisite insurance premium and the instalments and interest payable under clause (f) of the third mortgage, and the first respondent on July 2, 1953, sent him a notice under clause (e) requiring him to rectify such defaults within five weeks, failing which the first respondent would take action to recover the principal sum and interest due under the third mortgage. The appellant did not comply with the notice.

The trial of the action took place at Mombasa on July 29 and 30, and August 23 and 24, 1954, before Henry Mayers J. who, on November 11, 1954, delivered judgment in favour of the first respondent.

By an order dated November 15, 1954, Henry Mayers J. directed that an account be taken by the registrar and the amounts found due to the first, second and third respondents respectively be certified on or before December 15, 1954; that the appellant should have three months from the date on which such account was delivered within which to pay all sums as might be found due upon such account; and in default of such payment within such period that a preliminary decree for the sale of the mortgaged property free from prior mortgages should be issued, followed by a final decree against the appellant for the amount (if any) by which the sum realised upon such sale was insufficient to discharge the appellant's liability to the first respondent in full.

By a preliminary decree for sale dated January 21, 1955, after declaring that the several amounts therein mentioned were due to the first, second and third respondents respectively under their respective mortgages, it was decreed as follows: "(1) That "if the defendant No. 1 pays into court the three amounts so "declared due on or before the said 15th day of March, 1955, the "plaintiff and the defendants Nos. 2 and 3 shall deliver up to "the defendant No. 1 or to such person as he appoints all "documents in their possession or power relating to the proper-"ties under the said charges, . . . (2) That if such payment "is not made on or before the said 15th day of March, 1955, the "properties charged or a sufficient part thereof be sold and that "the proceeds of the sale (after defraying thereout the expenses "of the sale) be paid into court and applied in payment firstly "of what is declared due to the defendant No. 2 as aforesaid, "secondly in payment of what is declared due to the defendant "No. 3 as aforesaid and thirdly of what is declared due to the "plaintiff as aforesaid, together with subsequent interest and "subsequent costs. . . . (3) That if the net proceeds of the "sale are insufficient to pay such amounts and such subsequent "interest and costs in full, a personal decree be issued against "the defendant No. 1 in favour of the defendant No. 2, defen-"dant No. 3 and/or the plaintiff as the case may be, for the "amount of the balance." By a final decree for sale dated May 20, 1955, after reciting that the payment directed by the preliminary decree for sale had not been made by the appellant or any person on his behalf, it was ordered that (1) the properties charged in favour of the second, third and first respondents should be sold, (2) the moneys realised by such sale should be paid into court and should be duly applied in payment of what was due to the second, third and first respondents as therein provided, and (3) if the net proceeds of sale were insufficient to pay the sums therein mentioned the second, third or first respondents as the case might be should be at liberty to apply for a personal decree for the amount of the balance.

The appellant appealed to the Court of Appeal for Eastern Africa against the whole of the decision of Henry Mayers J. The appeal was dismissed with costs.

1958. July 14, 15. *H. E. Francis* for the appellant. The findings of fact of the trial judge are not disputed. The main ground of this appeal is that on the true construction of the third mortgage and of section 67 of the Indian Transfer of Property Act, 1882 (as applied to Kenya), the first respondent was not entitled to an order for the sale of the mortgaged property. The covenant in the third mortgage is to repay the principal sum "on "June 30, 1968." That covenant contained by necessary implication a negative stipulation that the mortgagee would not sue for the principal sum before the specified date: *Bolton* v. *Buckenham.*[1] Clause (e) of the third mortgage is void as being repugnant to the preceding covenant for repayment, since it would destroy both the obligation of the mortgagor to repay the principal sum on June 30, 1968, and the obligation of the mortgagee not to sue for it before that date. The principle of law is that if in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails: *Forbes* v. *Gitt.*[2] Alternatively, clause (e) operates only to give the mortgagee a right to a personal decree in proceedings brought for that purpose; the first respondent has not in these proceedings sought a personal judgment under clause (e) for the whole of the mortgage money or under clause (f) for the unpaid instalments. There is no jurisdiction to order a sale of the mortgaged property under section 67 of the Act of 1882 except in circumstances in which it would be proper to make an order for foreclosure. No right of foreclosure arises until some condition of the proviso for redemption has been broken and the mortgagee's estate has become absolute at law (*Williams* v. *Morgan*[3]); the appellant here has not broken the condition of the proviso for redemption contained in clause (h). [Reference was also made to *Edwards* v. *Martin*[4] and *Sew* v. *Koreeshee*.[5]]

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[1] [1891] 1 Q.B. 278, 281.
[2] [1922] 1 A.C. 256, 259.
[3] [1906] 1 Ch. 804, 807.

Arthur Bagnall for the respondents. The first respondent's right to enforce the security created by the third mortgage depends (having regard to the provisions of section 67 of the Act of 1882) solely on the construction of the third mortgage. Upon a sound construction of that mortgage there is no inconsistency or repugnance between the initial covenant to repay the principal moneys thereby secured on June 30, 1968, and (a) the subsequent provisions for the first respondent to be at liberty to demand repayment of such principal moneys and interest upon the appellant making any of the specified defaults, and (b) the subsequent provision for repayment of the principal moneys by instalments and for redemption on repayment of principal and interest by June 30, 1968. On July 2, 1953, the appellant had failed to comply with the covenants and conditions to be observed by him in clause (e) and further failed so to comply within five weeks after service upon him of the proper notice. Before August 8, 1953 (the date of the plaint), the whole of the principal moneys and interest then unpaid by the appellant under the third mortgage had become payable to the first respondent, who thereupon became entitled to an order for sale of the mortgaged property. On the true construction of the third mortgage there was not therein contained any " contract to the contrary " within the meaning of section 67 of the Indian Transfer of Property Act, 1882. The terms of the deed itself negatived the idea that the mortgagee had in all the circumstances to wait until June 30, 1968, before enforcing his security.

October 2. The judgment of their Lordships was delivered by LORD RADCLIFFE. This appeal from the Court of Appeal for Eastern Africa relates to proceedings instituted in the Supreme Court of Kenya at Mombasa by the first respondent to enforce his security under a mortgage of certain land on the Island of Mombasa which was granted to him by the appellant. The second and third respondents hold prior mortgages of the same property, so that the mortgage now in question is a third mortgage. The Supreme Court gave judgment in favour of the first respondent on November 11, 1954, upholding the validity of his mortgage. This judgment was followed by three orders in the same court dated respectively November 15, 1954, January 21, 1955, and May 20, 1955, the effect of which was to pass a final decree for sale of the mortgaged property and for satisfaction out of the proceeds of sale of the sums found due to the respective mortgagees on their several mortgages, the mortgagees being given liberty to apply for personal decrees against their mortgagor for payment of any balances due to them, if the proceeds of sale proved insufficient to satisfy them in full.

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[4] (1856) 25 L.J.Ch. 284.

[5] (1900) L.R. 27 I.A. 98.

An appeal against these orders was dismissed by the Court of Appeal on March 27, 1956. The mortgagor's main point in his argument before this Board has been to the effect that having regard to the provisions of section 67 of the Indian Transfer of Property Act, 1882, as applied to Kenya, and to the terms of the third mortgage, the first respondent was not entitled to obtain an order for sale from the court. This point was not raised during the hearing of the case in the Supreme Court, which was concerned with other issues affecting the enforceability of the mortgage, but was argued, though unsuccessfully, before the Court of Appeal. The mortgagor has also raised two points, essentially procedural, which impugn in some respects the form of the Supreme Court Order dated January 21, 1955, which was a preliminary decree for sale. These points were raised neither before that court nor before the Court of Appeal. For the reasons which will be mentioned more fully later it is not the intention of their Lordships to give any decision upon these procedural points which in the circumstances are not open to the appellant.

The appellant's main argument is that the proviso for redemption in the third mortgage amounted to an agreement that so long as the mortgage money and interest were paid up by June 30, 1968, the mortgagor should be entitled to the return of his security on that date or thereafter. It is not in dispute that the monthly interest stipulated for by the mortgage had fallen into arrear before proceedings were commenced or that, by virtue of this and notice given in respect of it, the principal moneys due on the mortgage had become immediately repayable: but the mortgage is so drawn, it is said, that nevertheless the undertaking for reconveyance on or after June 30, 1968, remains in force so that until that date the mortgagor has a continuing chance of recovering his property by tendering the full amount of principal and interest contracted for. Such an undertaking then—and, if the premise is right the conclusion may well follow—amounts to a "contract to the contrary" within the meaning of section 67 of the Transfer of Property Act, 1882, and therefore precludes the possibility of a sale or foreclosure under the process of the court before that date.

Section 67 provides: "In the absence of a contract to the "contrary, the mortgagee has at any time after the mortgage "money has become due to him and before a decree has been "made for the redemption of the mortgaged property, or the "mortgage money has been paid or deposited as hereinafter "provided, a right to obtain from the court a decree that the "mortgagor shall be absolutely debarred of his right to redeem "the property, or a decree that the property be sold."

To assess the validity of this contention it is necessary to decide what the contractual scheme of the third mortgage amounts to. It is a somewhat complicated document which is not drawn with any great nicety of draftsmanship. But for all that there is no need to make any mystery about its effect or the expressed intentions of the parties. Properly understood, the document appears to their Lordships to afford no support to the appellant's highly improbable construction. It is best to set out a summary of the main provisions of the mortgage, as they affect this point, in the order in which they appear in the deed and then to say what, read together, they amount to as a contractual scheme.

(i) The mortgage was by indenture dated October 29, 1951, and was made between the appellant as mortgagor and the first respondent as mortgagee.

(ii) The deed recited first and second prior mortgages of the same date, and stated that the consideration for the mortgage was the sums of 130,000 shillings advanced and 20,000 more shillings to be advanced to the mortgagor by the mortgagee upon the security of the intended third mortgage.

(iii) The mortgagor covenanted in consideration of the sums of 130,000 shillings lent and 20,000 shillings to be lent on November, 15, 1951, to pay to the mortgagee the sum of 150,000 shillings on June 30, 1968, together with interest thereon at varying rates on different sectors of the total sum, all such interest to "be "paid . . . at the end of every month as it accrues due and "becomes payable."

(iv) Certain leasehold interests in land on the Island of Mombasa were assigned to the mortgagee as security for the mortgage, subject to the two prior mortgages.

(v) The mortgagor entered into a number of covenants with the mortgagee, among them covenants to complete buildings on the mortgaged property; to pay all sums becoming due either for principal or interest on the prior mortgages; to observe the terms of the head leases of the land mortgaged and to pay ground rent, rates, taxes and outgoings; to keep the buildings on the site insured and to pay the premiums required.

(vi) Three of the mortgagor's covenants were in the following terms:

" (*e*) Should the mortgagor make any default in payment of " the ground rents, municipal rates and taxes, insurance and " payments of premium or premia in respect thereof or should " he fail to pay interest regularly and punctually to the " mortgagee under the first and second mortgages or should he " fail to pay the interest due on the principal sum or sums " advanced regularly as hereinbefore provided or should he fail " to carry out any of the covenants and conditions and agree- " ments herein contained then in any one of such cases the " mortgagee shall be at liberty to demand the repayment of the " principal sum together with all interest due thereon notwith- " standing the time for repayment thereof hereinbefore provided " and shall be entitled to recover the same through a court of law " provided always that the mortgagee shall not enforce his " right to claim and recover the whole principal sum in event of " any of the above defaults until after January 1, 1952, and even " after the said date until after a five-week previous written " notice is first given by the mortgagee to the mortgagor demand- " ing the compliance of any default or breach as aforesaid AND " PROVIDED ALWAYS THAT the mortgagor shall not permit " any increase of amount under either or both of the two previous " mortgages in respect of interest, premium ground rents, muni- " cipal rates or in any other way whatsoever AND should the " mortgagor permit such an increase after January 1, 1952, the " mortgagee shall also be entitled if after a notice in writing of " five weeks any of such amounts are not paid up to claim the " whole amount of loan and interest forthwith notwithstanding " the period of repayment.

" (*f*) He the mortgagor agrees that he will repay the sum of " Shs.150,000/– . . . to be advanced hereunder by twenty-five half " yearly instalments of Shs.5,000/– . . . the first of such half " yearly instalments to be paid on June 30, 1952, and the remain- " ing twenty-four at the end of every six months and thereafter " the balance by eight half yearly instalments the first seven " instalments of Shs.3,000/– . . . each and the eighth instalment " of Shs.4,000/– . . . thus paying off the whole amount by June " 30, 1968, as hereinbefore provided and from such half yearly " payments the mortgagee shall accept Shs.3,000/– . . . towards "the reduction of the sum of Shs.100,000/- and Shs.2,000/- towards the reduction of the first Shs.25,000/- and after the first "Shs.25,000/- has been paid of the subsequent payment of "Shs.2,000/- towards the reduction of the second Shs.25,000/- "and after such payments interest will run on the balance or "balances due in respect of the respective sums. Provided always "and it is hereby agreed that the mortgagee shall appropriate the "first payment or payments towards the amount or amounts "expended by him the mortgagee for insurance, interest due and "other outgoings and only after satisfaction in full of all such "payments the payments will be applied towards the reduction "of the principal sum or sums.

"(*g*) The mortgagor shall be entitled to make payment of any "amount but not less than Shs.5,000/- at any time other than "the instalments hereinabove stated towards the amount due "under this mortgage and the same shall be appropriated by the "mortgagee as stated in clause (*f*) hereof."

(vii) Finally, the proviso for redemption took the form of a covenant by the mortgagee with the mortgagor as follows:

". . . if the mortgagor shall repay the total principal sum "advanced under these presents together with interest thereon "due as hereinbefore provided by June 30, 1968, the mortgagee "will at any time thereafter after the expiry of the stipulated "date at the request and cost of the mortgagor reassign and "surrender the lands and all buildings to the mortgagor as he the "mortgagor may direct."

There are, of course, certain parts of this scheme which are not capable of being reconciled with each other in literal terms. If the mortgagor was under obligation to repay the whole 150,000 shillings on June 30, 1968, he could not at the same time be required or entitled to pay off parts of that sum by instalments during the intervening period. If the principal money became immediately payable in default of interest, etc., under clause (e), the mortgagor could not continue thereafter to be under a simultaneous liability to pay up either the principal sum on June 30, 1968, or instalments of it at fixed dates in the interim. A similar difficulty on the wording of the document would arise if the mortgagor exercised his power of anticipating mortgage payments under clause (g).

But these difficulties are not so great as to call for any such desperate expedient as rejection of one or more parts of the deed on the ground of inconsistency. On the contrary, their Lordships are of opinion that the scheme agreed upon was easily intelligible

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from the document read as a whole and its total effect can be summarised under the following heads: (1) The mortgagor was to pay interest monthly on sums outstanding on the mortgage, to pay off the principal by the instalments and at the dates specified in clause (f) and, if the instalments were paid off, according to that schedule, thus wiping out the debt by June 30, 1968. and interest were paid monthly in the meantime, the security was to be reconveyed on or after that date. (2) On the other hand, if the mortgagor failed to observe any of his various covenants and obligations under the mortgage deed, including his obligation to pay instalments and current interest, the mortgagee was entitled from January 1, 1952, to give five weeks' notice calling in the whole principal sum then outstanding and to resort to a court of law to enforce the payment by any form of process which it might be within the power of the court to grant.

So construed, the mortgage deed contains no "contract to "the contrary" within the meaning of section 67. The appellant's argument seeks to extract such a contract from the proviso for reconveyance by interpreting that proviso as meaning that, no matter to what extent the scheme of payment provided by the earlier clauses or the covenants for protecting the value of the security had broken down, so that the enforcement provisions of clause (e) had had to be brought into play, nevertheless the mortgagor was still entitled to have the security retained, unsold or unforeclosed, until June, 1968, on the chance that he might turn up by that date with a full tender of principal and interest owing. No doubt there can be cases in which, either by accident or design, a proviso for redemption or reconveyance may express some such arrangement between mortgagor and mortgagee. *Williams* v. *Morgan*,[1] which was referred to in argument, is an instance of such a case. But this mortgage is not one of them. It is sufficient to mention two reasons for that conclusion. In *Williams* v. *Morgan* the condition upon which the mortgagee was to return to the mortgagor his pledged estate had not been broken. The obligation stood. Here the condition has been broken, since the proviso requires that interest on the mortgage money should have been paid "as hereinbefore "provided," and the foregoing provisions of the deed call for interest to be paid monthly and not otherwise. The obligation does not therefore stand. Secondly, the mortgage in *Williams* v.

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[1] [1906] 1 Ch. 804.

Morgan contained no stipulation comparable with clause (e) of the present deed. Clause (e) explicitly negatives the idea that the mortgagee is in all circumstances to wait until June, 1968, before enforcing his security. There is no warrant for cutting down the meaning of such phrases as " recover the same through " a court of law " and " enforce his right to claim and recover " . . . " to extend only to an action for personal debt. But, if the words of clause (e) are accorded their natural meaning and the proviso for reconveyance which follows is read in the light of them, it must result that the rights and obligations created by that proviso are only binding so far as they are not rendered incapable of effect by an earlier assertion of the mortgagee's rights under clause (e).

Their Lordships will now notice the procedural points which were raised by the appellant in argument before them. It is desirable that they should be attended to even though no decision is given upon them, since they are not insubstantial and it is possible that they indicate some looseness of practice in the courts in Kenya to which the attention of the judicial authorities there might usefully be directed. The first point made is that the order of the Supreme Court dated November 15, 1954, and the two consequent decrees for sale were erroneous in that the sale was ordered to take place if the mortgagor did not bring into court within the time specified the sums of money due on all three outstanding mortgages: whereas, it is argued, the condition required of him should have been limited to his bringing into court the money due on the third mortgage only. The third mortgagee was the sole plaintiff in the action, the sole party explicitly claiming relief, and the contingent sale decreed by the court for the purpose of affording that relief should not have been made dependent upon compliance with a condition the effect of which was to secure payment in full to the first and second mortgagees as well, parties who were asking for no relief in the action. The form of order for foreclosure or sale which is prescribed by sections 86 and 88 of the Transfer of Property Act, 1882, does not envisage that the preliminary decree will provide for the mortgagor bringing into court anything more than the sum due to the mortgagee who is the plaintiff seeking relief, and the court, it is said, had no power to extend the content of such an order by requiring security for the sums due on the first and second mortgages as well.

To decide upon the validity of this argument would require a careful review of the regulations and practice of the Kenya courts.

If the matter were being dealt with under English practice, there would be force in it, because the prior mortgagees would not be likely or necessary parties to the third mortgagee's action against the mortgagor and the sale of that mortgagee's security could take place without affecting their rights, which would have priority over the rights of a purchaser of the property sold. But it does not follow that the position was the same in Kenya. In this suit the prior mortgagees were in fact joined as defendants. It may even be that, having regard to section 85 of the Transfer of Property Act, 1882, they must be regarded as necessary parties. Whether they were so or not depends on the meaning to be attributed to the words "property comprised in a mortgage" in that section. In the event neither of these mortgagees put in a defence: their counsel's submission, as recorded by the trial judge, was, "If plaintiff succeeds, provision should be made for "prior rights of first and second mortgagees. Instructions are "to support Patel" (counsel for the plaintiff) "in all his arguments." Presumably they must be taken as consenting that the sale that was ordered should be made free from their securities within the meaning of section 96 of the Act. If so, it would follow necessarily that provision would have to be made for an account of the sums respectively due to them and for payment of these sums out of the proceeds.

The appellant maintained that in raising this point about the form of the orders he was raising a point of jurisdiction before the Board to which attention must be given as of right. Their Lordships do not accept this view at all. The most that can be said against the orders is that in one respect they may have subjected the mortgagor to a condition more burdensome than that which in law could be required of him. But every order that is defective in form in that sense is not an order made without jurisdiction, since an order may be wrong without its being beyond the capacity of the court to make it. Whether in this particular case the right forms were gone through or not, it seems plain that, with all the parties before the court and the prior mortgagees explicitly asking that their prior rights should be protected, they either were treated as, or could have put themselves in the position of being, additional plaintiffs claiming relief against the mortgagor. If he had made at the time the objections which he has sought to raise now, any necessary adjustment of parties or pleadings could have been made. In the circumstances their Lordships are of opinion that he must abide by the result and that no question of any want of jurisdiction arises.

The second point of procedure raised by the appellant requires only brief notice, since it appears that it is still open to him to take it, if he wishes to, in the courts of Kenya. The preliminary decree for sale dated January 21, 1955, contained among other directions provisional personal decrees against the appellant in favour of the three mortgagees for the amount of any balance found due to them respectively and not provided for out of the proceeds of sale of the mortgaged property. The appellant draws attention to the fact that under rule 21 of the Kenya Rules of Court (Mortgage Suits) no personal decree may issue against a mortgagor for a balance of money payable to any party not a plaintiff in the suit.

This point is another one which, if valid, could probably have been disposed of in the course of proceedings by amendment. It should have been taken at the time of the drawing up of the Preliminary Decree. It was not, nor was any reference made to it before the Court of Appeal: and it is now of contingent importance only since the final decrees, which for this purpose superseded the preliminary decree, did not pass any personal decrees for payment but merely directed that, if the net proceeds of the sale then ordered were insufficient to pay the amounts found due and subsequent interest and costs in full, the several mortgagees should be at liberty to apply for personal decrees for the amount of the balance. If any such application is made by either of the respondent mortgagees, the appellant can put forward his point that, as defendants in the suit, they cannot as such be granted a personal decree against their mortgagor.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs.

Appeal dismissed.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Waltons & Co.*

BHARAT . . . . APPELLANT; J. C.*

AND 1959

THE QUEEN . . . . RESPONDENT. *July* 23, 29.

ON APPEAL FROM THE COURT OF APPEAL OF FIJI.

Fiji—Criminal law—Trial with "aid of assessors"—Misdirection by judge—Assessors disabled from giving aid—Judge disabled from taking their opinion—Murder—Provocation—Fiji Criminal Procedure Ordinance, c. 9, *s.* 246.

Criminal Law—Trial with aid of assessors—Misdirection by judge—Effect—Homicide—Provocation—Fiji.

At the trial of the appellant on a charge of murder, at which he gave evidence which raised issues of self-defence and provocation, the judge wrongly directed the assessors on the issue of provocation that the burden of proof was on the appellant, and also gave them a wrong description as to what amounted in law to provocation. Each assessor gave his opinion that the appellant was guilty of murder, and the judge subsequently gave judgment to the same effect. The appellant's appeal to the Court of Appeal of Fiji was dismissed:—

Held, that while at a trial "with the aid of assessors" under section 246 of the Criminal Procedure Code of Fiji, the judge was not bound to conform to their opinions, he must at least take them into account. Properly directed, it was possible that one or more of the assessors might have been of the opinion that the appellant was guilty of manslaughter only, and the fatal flaw in the trial was that the judge by his misdirection disabled the assessors from giving him the aid which they should have given and thus, in turn, disabled himself from taking their opinions into account as he should have done.

The case must be remitted to the Court of Appeal of Fiji with a direction that they should quash the conviction for murder and, in their discretion, either enter a verdict of manslaughter or order a new trial. The Court of Appeal for that purpose need not be constituted by the same judges as it was before.

APPEAL (No. 18 of 1959) in forma pauperis by special leave from a written order (which was read out by the registrar of the Court of Appeal of Fiji on February 16, 1959), dismissing the appellant's appeal against his conviction on October 18, 1958, in the Supreme Court of Fiji (Lowe C.J. sitting with five assessors) of murder. He had been sentenced to death.

The following facts are taken from the judgment of the

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* *Present*: LORD TUCKER, LORD DENNING and the RT. HON. L. M. D. DE SILVA.

Judicial Committee: On the night of May 29, 1958, two men named Chanan Singh and Govindappa were killed in Fiji. On the next day the appellant Bharat, son of Dorsamy, was charged with the murder of them. Two separate indictments were afterwards laid against him. The first to be tried was the indictment charging him with the murder of Chanan Singh. The other remained on the file.

The appellant was the barman at the Tavua Hotel in Fiji. On the evening of May 29, 1958, he was on duty in the bar. Chanan Singh and Govindappa were drinking there. About 9 p.m. the appellant left the bar. About half an hour later the other two left. Neither of them was ever seen alive again. Some little time afterwards a house-girl from the hotel found their dead bodies on a road not far away. The appellant was arrested. He at first denied any knowledge of the killing but later admitted that he did it. At the trial, after the evidence for the prosecution had been heard, he gave evidence on his own behalf and said: "I went off and went for a stroll towards town. I went nowhere "in particular but went along the road some distance and then "walked back towards the hotel. On my way about three or "four chains from the hotel I met Chanan Singh and Govindappa. They both stood and Govindappa said: 'You were "'showing a lot of cunning in the hotel. I will fix you up now.' "Then he attacked me with a stick. He raised the stick. As "he tried to deliver the first blow I got hold of the stick. A "struggle for possession of the stick ensued and the stick fell to "the ground. To save myself I wanted to run away. Just then "Chanan came and got hold of me. Govindappa came and got "hold of my throat. I struggled to free myself. My state of "mind was upset. I was helpless and could not do anything so "I took out my pocket knife and attacked. While Govindappa "had me by the throat Chanan Singh was holding me. I was "very excited, so much so that I did not know what I was doing. "I can't even say on whom and how many times I struck with "the knife. After a while I found myself free of the others. I "got up and ran towards the hotel. Later on S/Insp. Akuila "came and sent me to the police station. I knew Chanan Singh "for about three years before that night. I had no trouble with "him at any time during that period. He was an acquaintance "of me. There was never any trouble with him at any time "nor was there any trouble with him at the bar that evening."

The trial was held in October, 1958, before the Chief Justice of Fiji (Lowe C.J.), sitting with five assessors. On October 18, 1958, the appellant was found guilty of the murder of Chanan Singh and sentenced to death. He appealed to the Court of Appeal against his conviction. The appeal was heard by two judges who had been appointed specially to hear it. They came from New Zealand. They were Sir George Finlay (who acted as President of the Court of Appeal) and Sir Joseph Stanton. After hearing argument they reserved their decision and returned to New Zealand. They afterwards sent their written opinions to the registrar of the Court of Appeal and he read them in open court. It appeared from their opinions that the two judges were equally divided. Sir George Finlay was for allowing the appeal and Sir Joseph Stanton for dismissing it. In the result the appeal was dismissed. Thence the appellant appealed to Her Majesty in Council.

1959. July 23. *E. F. N. Gratiaen* and *L. Kadirgamar* for the appellant. The case for the Crown as presented was based on circumstantial evidence which pointed to the appellant's guilt, and also he ultimately confessed that he had stabbed the deceased on the night in question; so there is no issue as to that aspect of the matter. It was a trial with the aid of assessors. The issue of self-defence was raised. There was also a question that the appellant had retaliated in anger, and it is submitted, first, that the trial judge very gravely misdirected the assessors and himself as to the burden of proof with regard to the issue of provocation. In these circumstances the appellant was not properly tried for murder " with the aid of assessors " as required by section 246 of the Criminal Procedure Act of Fiji. It is an essential prerequisite to a trial " with the aid of assessors " that the trial judge should have the assistance of assessors not misled as to the law. Here the judge has divested himself of an element of the proceedings for the protection of the accused. Misdirection by the judge was certainly admitted in the Court of Appeal, and their written judgments proceeded on that assumption. Each assessor expressed the opinion that the appellant was guilty of murder. The appellant admittedly killed the deceased—he did not challenge the case for the prosecution up to a certain point; but the complaint is that the judge, not having put the issue of provocation properly to the assessors, divested himself of their aid on that matter. He did not direct himself at all on the issue of provocation: the word " provocation " appears once in the summing-up and not at all in his judgment. If the judge set the assessors off on a completely false trail there was no aid that could possibly be given by them, and under the scheme of the Code it is an essential stage of the trial that the assessors should give the judge the benefit of their opinions. The misdirection here was as grave as one could imagine. It is not safe to assume that properly directed on the issue of provocation all or some of the assessors might not have come to the conclusion that the verdict should be manslaughter and not murder.

On the importance of having the opinions of the assessors pronounced in open court, see *Mahlikilili Dhalamini* v. *The King* [1]; implicit in the judgment in that case is that it is a fundamental part of the proceedings that if anything vitiates the opinions of the assessors, the subsequent independent opinion of the judge is equally invalid. The recording of the opinions is fundamental to the decision of the judge, who must pay due regard to them. It is impossible to say here that if there had not been a misdirection the assessors would necessarily have rejected the defence of provocation. And then it would be a question of speculation. In effect, the appellant is in the same position—and no better one—than the accused persons in the long series of cases where the issue of provocation was expressly withdrawn. [Reference was made to *Kwaku Mensah* v. *The King* [2]; *Chan Kau* v. *The Queen* [3]; and *Bullard* v. *The Queen.* [4]]

[He was stopped on this point.]

The second ground of appeal is that, judgment having been reserved by the two retired judges of the High Court of New Zealand who were appointed to hear the appeal, the judges each returned to New Zealand, and in the result the court which adjourned to consider its decision never reassembled to pronounce its judgment. Instead, what happened was that two separate signed judgments or written determinations were posted from New Zealand to Fiji. That of the President expressed the opinion that the conviction should be quashed on the ground of misdirection and other grounds. The other judge expressed the opinion that, notwithstanding the misdirection, the conviction should stand. Those two dissenting opinions having been forwarded to the registrar of the Court of Appeal, he, on February 16, 1959, without, it is submitted, a court, read out to counsel—it does not appear whether the appellant was present—the two judgments; and at the conclusion of the President's opinion the President said that by virtue of the statutory consequences of section 6 of the Court of Appeal Ordinance the appeal should be dismissed. The appellant was entitled to have his appeal heard and determined, and there was a breach of the requirement of section 30 of the Court of Appeal Ordinance that the judgment of the court should be pronounced either by the senior judge present or some other judge present as directed by the senior judge, or (in terms of the proviso) by each of the judges separately, and the failure of the court to comply with those provisions in the appellant's case vitiates the dismissal of his appeal. The purported order dismissing the appeal should be quashed; or, if not, the Board may take the view that in the interests of finality, instead of directing that the appeal should be heard and determined according to law, it should direct the Court of Appeal to substitute a verdict of manslaughter.

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[1] [1942] A.C. 583, 589; [1943] 1 All E.R. 463.

[2] [1946] A.C. 83, 91.

[3] [1955] A.C. 206; [1955] 1 All E.R. 266.

[4] [1957] A.C. 635.

D. A. Grant for the Crown. First, with regard to the trial, it is conceded at once that the Crown do not seek to argue that there was no misdirection on the issue of manslaughter. The only two matters now advanced are: (1) whether there was here a case on which a reasonable court, properly directed, could have found manslaughter; and (2) whether the findings of fact of the trial judge excluded altogether the possibility of finding manslaughter. As to (1), there was evidence on which manslaughter could have been found—that of the appellant himself. As to (2), the judge was satisfied that the appellant was not telling the truth, and that was not influenced by the views of the assessors. Even if the assessors, properly directed, had all found manslaughter, the judge could still have put his judgment in the form in which it is at present. There has not in this case been anything so outrageous as to shock the very basis of justice. The distinction between this case and those cited is that here there was a detailed judgment and not a verdict of a jury. There are various orders this Board could make, but it is submitted that the right result would be to order a new trial or to remit the matter to the Court of Appeal.

With regard to the procedure point, it is submitted that there had not been a breach of the ordinary rule that the result should be given in open court. The case comes under the second sentence of section 6 (3) of the Court of Appeal Ordinance—" If on " the hearing of an appeal . . . the Court of Appeal is equally " divided the appeal . . . shall be dismissed." It is conceded that there has been an irregularity; the Government of Fiji would like to know to what extent, after a judge has left Fiji, they can deliver his written judgment in his absence. This point is not, however, a vital matter on this appeal.

Gratiaen in reply. In this case there was a clear misdirection. A retrial would rarely be ordered in the circumstances of this case. On the facts here it would be in accordance with justice to substitute a verdict of manslaughter for murder.

July 23. LORD TUCKER. Their Lordships will humbly advise Her Majesty that the appeal be allowed and the order of the Court of Appeal of Fiji set aside and the case remitted to the Court of Appeal of Fiji with a direction that they should quash the conviction of the appellant for murder and either substitute a verdict of manslaughter, and pass sentence accordingly, or order a new trial, whichever course they consider proper in the interests of justice in the existing circumstances. Their Lordships will give their reasons later.

July 29. The reasons for their Lordships' decision were given by LORD DENNING, who stated the facts set out above and continued: It was submitted to their Lordships that the dismissal of the appeal was bad in law because it had not been pronounced by the senior judge or indeed by any judge who had been present at the appeal as required by section 30 of the Court of Appeal Ordinance of Fiji. Their Lordships were inclined to agree with this contention. But they were disinclined to enter into it too closely because it had nothing to do with the merits of the case. It could be corrected quite readily by having the dismissal properly pronounced and the case then brought back again before their Lordships. Their Lordships therefore proceeded to hear the argument on the other points.

The appellant's evidence clearly raised two issues for consideration. First, self-defence; second, provocation. The appellant was, of course, cross-examined on it. After all the evidence was concluded and speeches made, the judge summed up to the assessors as section 306 of the Criminal Procedure Code contemplates. He discussed at large the issue of self-defence. And then he mentioned the issue whether there was provocation such as to reduce the offence from murder to manslaughter. Unfortunately the judge directed the assessors wrongly upon this point. He said to them: "It has been suggested that you might think the "accused guilty of manslaughter. Before you could be justified "in thinking that, you would have to come to the conclusion that "the accused's story in that particular respect is true. You "would have to be satisfied beyond reasonable doubt that it "might be that the Crown were wrong as to that aspect, and "you would have to believe that the accused received such "provocation that he was justified in resisting force by using "force. I think you might find it difficult to believe that such "was the case."

It was conceded by the Crown that this direction was erroneous in point of law. It wrongly puts the burden of proof on the accused, and it gives a wrong description as to what amounts to provocation in law.

After hearing the summing-up each of the five assessors gave his opinion that the appellant was guilty of murder. It was then for the judge to give judgment, and he did so. He came to the same conclusion as the assessors. He gave a reasoned judgment holding the appellant to be guilty of murder. In it he dealt fully with the question of self-defence, and rejected it. But he did not mention the question of provocation.

What is the consequence of the misdirection given by the judge to the assessors? According to section 246 of the Criminal Procedure Code the trial is by the judge "with the aid of "assessors." The judge is not bound to conform to their opinions, but he must at least take them into account. If they have been misdirected on a vital point, their opinions are vitiated. Take this very case. Suppose the assessors had been properly directed, is it not possible that one or more of them might have been of opinion that the appellant was guilty of manslaughter only? If the majority of them had given such an opinion, the judge might possibly have accepted it in preference to his own. At any rate he could hardly have rejected it without saying why he did so. He has, in truth, by his misdirection, disabled the assessors from giving him the aid which they should have given; and thus in turn disabled himself from taking their opinions into account as he should have done. This is a fatal flaw.

On behalf of the Crown it was said that the misdirection did not matter, because the judge disbelieved the appellant's story altogether, and there was thus no foundation on which an issue of provocation could be raised. Their Lordships cannot accept this contention. Apart altogether from the appellant's evidence, there was some evidence of a struggle having taken place. Their Lordships think this was clearly a case where the question of provocation should have been considered: see *Bullard* v. *The*

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Queen.[1] The failure of the judge to direct the assessors properly upon it, or to consider it himself in his summing-up, means that his judgment cannot stand.

For these reasons their Lordships have advised Her Majesty that the appeal should be allowed and the order below set aside and the case remitted to the Court of Appeal of Fiji with the direction that they should quash the conviction for murder and either enter a verdict of manslaughter and pass sentence accordingly or order a new trial, whichever course they consider proper in the interests of justice in the existing circumstances. The Court of Appeal need not for this purpose be constituted by the same judges as it was before.

Solicitors: *T. L. Wilson & Co.; Charles Russell & Co.*

C. C.

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[1] [1957] A.C. 635; [1957] 3 W.L.R. 656.

[HOUSE OF LORDS.]

H. L. (E.)*
1958
Dec. 8, 9, 10.
1959
Jan. 28.

GENERAL NURSING COUNCIL FOR ENGLAND AND WALES . . . . . . APPELLANTS;

AND

ST. MARYLEBONE BOROUGH COUNCIL . RESPONDENTS.

Rates and Rating—Social welfare—Health—Council required by statute to maintain register of nurses—Claim for rating relief—Advancement of "social welfare"—Meaning—Nurses Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 15)*—Rating and Valuation (Miscellaneous Provisions) Act,* 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8.

An organisation which was regulated by the Nurses Act, 1957, and thereby required (inter alia) to maintain a register of nurses and to exercise supervisory powers in training and examination in pursuance of the Nurses Registration Act, 1919, claimed the benefit of the rating relief afforded by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, to organisations "not . . . conducted for profit and whose main objects

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* *Present*: LORD MORTON OF HENRYTON, LORD TUCKER, LORD COHEN, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

"are charitable or are otherwise concerned with the advancement "of religion, education or social welfare" within section 8 (1) (*a*):—

Held (Lord Cohen and Lord Somervell of Harrow dissenting), that the organisation did not come within the words of section 8 (1) (*a*).

Per Lord Morton of Henryton, Lord Tucker and Lord Keith of Avonholm. The object of the organisation to regulate the profession of nursing in the manner and to the extent set out in the Act was neither charitable nor otherwise concerned with the advancement of social welfare.

Per Lord Cohen. The organisation has two main objects, the enhancement of the quality and status of nurses and the protection of the public, particularly the sick; the former, which was a main object and not merely ancillary, was not charitable. But both objects were otherwise concerned with the advancement of social welfare.

Per Lord Somervell of Harrow. Both the advancement of the care of the sick and the enhancement of the status of nurses as provided by the Act were the advancement of social welfare.

General Medical Council v. *Inland Revenue Commissioners* (1928) 97 L.J.K.B. 578; 44 T.L.R. 439 and *General Nursing Council for Scotland* v. *Inland Revenue Commissioners,* 1929 S.C. 664; 14 T.C. 645 approved.

National Deposit Friendly Society Trustees v. *Skegness Urban District Council,* ante, 293; [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601 considered.

Decision of the Court of Appeal [1958] Ch. 421; [1957] 3 W.L.R. 1039; [1957] 3 All E.R. 685 affirmed.

Appeal from the Court of Appeal (Lord Evershed M.R., Romer and Ormerod L.JJ.).

This was an appeal from an order of the Court of Appeal dated November 26, 1957, reversing an order of the Chancery Division (Danckwerts J.) made on June 27, 1957. The last-mentioned order was made in proceedings commenced by originating summons issued by the appellants, the General Nursing Council for England and Wales, against the respondents, the St. Marylebone Borough Council (who were the rating authority for the borough of St. Marylebone), for the determination of the question whether on the true construction of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the appellants were such an organisation as was therein mentioned.

The question for determination was whether the appellants were "an organisation . . . which is not established or conducted "for profit and whose main objects are charitable or are otherwise "concerned with the advancement of religion, education or social "welfare" within the meaning of section 8 (1) (*a*), and, accordingly, entitled to such relief from rates as was accorded by that section. It was common ground that the appellants were not established or conducted for profit, and in view of the decision of the Court of Session in *General Nursing Council for Scotland* v. *Inland Revenue Commissioners*,[1] when the contrary was decided, it was not contended before Danckwerts J. or in the Court of Appeal that the main objects of the appellants were charitable.

The facts are set out in the opinion of Lord Morton of Henryton.

G. D. Squibb Q.C. and *William Roots* for the appellants. The questions are (1) whether the main objects of the appellants are charitable, and (2), if they are not, whether the main objects of the appellants are concerned with the advancement of social welfare.

On the first question, the main objects are charitable. *General Medical Council* v. *Inland Revenue Commissioners*[2] is distinguishable or, alternatively, was wrongly decided. *General Nursing Council for Scotland* v. *Inland Revenue Commissioners*[3] was wrongly decided. *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.*,[4] dealing with the medical aspect of the law of charities, supports the appellants, and it is with that case that this case truly compares. The preamble to the Statute 43 Eliz. 1, c. 4, is embodied in the Mortmain and Charitable Uses Act, 1888, by section 13 (2) and is still the basis of the law of charities. *Royal College of Nursing* v. *St. Marylebone Borough Council*[5] is also relied on. From *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*[6] it appears that a charity must be of an altruistic nature. It must be directed to the benefit of a portion of the community that needs help. "Altruistic" is not, however, synonymous with "for the public benefit." The relief of human suffering is a form of charity and that is what nursing is.

The respondents contend that the appellants are established only to carry out statutory duties relating to the keeping of a register of nurses. Their fallacy is to equate powers with objects on the ground that one must infer objects from a consideration of powers and duties.

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[1] 1929 S.C. 664; 14 T.C. 645.

[2] (1928) 97 L.J.K.B. 578; 44 T.L.R. 439.

[3] 1929 S.C. 664.

[4] [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.

[5] [1958] 1 W.L.R. 95; [1958] 1 All E.R. 129.

[6] Ante, 293, 323; [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.

There are three possible inferences from the Nurses Act, 1957. (1) It might be inferred that the main object of the appellants is the relief of suffering by assuring proper nursing: see the case of the *General Nursing Council for Scotland.*[7] (2) It might be inferred that the main object was to regulate the nursing profession and secure privileges for the nurses. The high-water mark of that approach was the case of the *General Medical Council,*[8] *per* Sargant L.J., who puts the case against the appellants at its highest. But the mere length of time a decision has stood is not a reason for not overruling it: see *Royal College of Surgeons*[9] and *Brownsea Haven Properties Ltd.* v. *Poole Corporation.*[10] (3) It might be inferred (as the Court of Appeal did here) that there was more than one object and that they were essentially inseparable.

The first is the correct inference. One must distinguish results from objects. If a man was writing a thesis for a doctorate, his research might enlarge the field of human knowledge but his object might still be to get a doctorate; it would be a matter of inference in the particular case.

Here the single main object is the relief of human suffering. This is a far stronger case than that of the *Royal College of Nursing.*[11] If some question arose on the construction of the Nurses Act, one alternative being in favour of nurses and the other in the general public interest, the court would have no hesitation in giving it a construction which advanced the general public interest. The mischief with which that Act was dealing was that of unqualified nurses imposing on the public: see the case of the *General Medical Council.*[12]

If the main object of the appellants is to secure better nursing, that is a charitable object: see the case of the *Royal College of Surgeons.*[13] A body whose object is to provide nursing care for the sick aims at the relief of human suffering and is therefore charitable because it is of general public utility and analogous to the objects set out in the Statute of Elizabeth I.

On the second question, " social welfare " covers relief of persons who by reason of their circumstances are in special need of relief of a kind analogous to that provided for by the Statute of Elizabeth I. *Inland Revenue Commissioners* v. *Baddeley*[14] led to the extension beyond the bounds of legal charity embodied in section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. In that case the House of Lords had to consider the concept of "social well-being." For the meaning of "social "welfare," see *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council.*[15] Other "social welfare" cases are *Derbyshire Miners' Welfare Committee* v. *Skegness Urban District Council*[16]; *Berry* v. *St. Marylebone Urban District Council*[17]; *Independent Order of Oddfellows Manchester Unity Friendly Society* v. *Manchester Corporation*[18] and *Working Men's Club and Institute Ltd.* v. *Swansea Corporation.*[19]

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[7] 1929 S.C. 664, 677; 14 T.C. 645, 660.

[8] 97 L.J.K.B. 578, 587.

[9] [1952] A.C. 631.

[10] [1958] Ch. 574; [1957] 3 W.L.R. 669; [1957] 3 All E.R. 24.

[11] [1958] 1 W.L.R. 95, 98 et seq.

[12] 97 L.J.K.B. 578.

[13] [1952] A.C. 631, 654–655.

If the main objects of the appellants are not charitable, they are otherwise concerned with the advancement of social welfare within the meaning of the Act, and they are not prevented from so being because their funds are provided under the provisions of an Act of Parliament: see the *Derbyshire Miners* case.[20]

Even if the main object of the appellants is to enhance the quality and status of nurses, they still fall within the Act because that is concerned with the advancement of nursing, which is a form of social welfare. Nurses only exist for the purpose of nursing the sick. The legislature is only interested in them in their capacity as nurses. This is social welfare, which is for the public benefit, although admittedly public benefit is not the test of social welfare.

Geoffrey Cross Q.C. and *E. B. Stamp* for the respondents. The present claim is made by a body set up by a public statute by which it is charged with a specific duty to be carried out under the supervision of the Minister of Health and the ultimate surveillance of Parliament. The objects of such a body are not charitable at all. It is inconceivable that in the case of such a body the court would exercise control in proceedings taken by the Attorney-General or would formulate a scheme. See, in particular, sections 1, 12, 27 and 28 of the Nurses Act.

The position of this body in relation to the training of nurses

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[14] [1955] A.C. 572; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525.

[15] [1957] 2 Q.B. 573, 581; [1957] 3 W.L.R. 550; [1957] 3 All E.R. 199; (H.L.) [1959] A.C. 293; [1958] 3 W.L.R. 172, 183.

[16] [1958] 1 Q.B. 298; [1957] 3 W.L.R. 1049; [1957] 3 All E.R. 692.

[17] [1958] Ch. 406; [1957] 3 W.L.R. 1029; [1957] 3 All E.R. 677.

[18] [1958] 1 W.L.R. 1171; [1958] 3 All E.R. 378.

[19] [1958] 1 W.L.R. 1135; [1958] 1 All E.R. 414.

[20] [1958] 1 Q.B. 298, 306.

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does not differ from that of the General Medical Council in relation to the training of doctors. Its only object is to keep the register of nurses, to train nurses and conduct examinations. The court, looking at its main object, must ask: (1) Is it a charity? (2) If not, is it concerned with the advancement of religion, education or social welfare? See the case of the *General Medical Council.*[21] There is no difference between what was said there with regard to the General Medical Council and the right view of the position of the appellant council. That case is not distinguishable. *Pig Marketing Board* (*Northern Ireland*) v. *Inland Revenue Commissioners* [22] supports the view that this body is not charitable. A charitable trust must be capable of execution under the control of the court: see *Morice* v. *Bishop of Durham.*[23] See also *In re Shipwrecked Fishermen and Mariners' Royal Benevolent Society.*[24]

One must read such an Act to see whether or not it sets up a body on which it imposes specific statutory duties analogous to those of a private trust. One could not, for example, say that the funds held by the Pig Marketing Board are held on a charitable trust. It is accepted that one can have a body established by statute which is a charity. But section 30 of the Nurses Act confers a power which one would not expect in the case of a charitable trust. Still, the fact that the body was established by statute is not conclusive as to whether or not it is a charity; that is a question of construction. But, having regard to the general nature of the statute which set it up, this body is not charitable. One is not entitled to look beyond the Act. The only object of this body is to maintain the register and to see that suitable people get onto it and unsuitable people are taken off. The court is not concerned with the motives of Parliament or the results for which it may have hoped. The regulation of a profession is not a charitable object. Take section 3 (1) (*b*) of the Act, dealing with training. Even if the training in an institution approved by the appellant council were extremely defective, the court could not have regard to that or inquire into the probable results, because it must obey the Act. The whole scheme of the Act is to regulate the profession of nursing: see the case of the *General Medical Council.*[25] The medical and nursing professions do not stand in a peculiar position different from other professions. Even if the underlying activity be charitable, it does not follow that the regulating body is charitable. The fallacy of the appellants' argument is to look at the ultimate possible results of the regulation and to go beyond the objects of the Act. An Act like this is not parallel to one establishing a college. The case of the *Royal College of Surgeons* [26] does not help here. The similar case of the *Royal College of Nursing* [27] does not help. *The General Medical Council* case [28] is exactly in point and the appellants cannot succeed unless it is overruled: *General Nursing Council for Scotland* [29] followed it.

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[21] 97 L.J.K.B. 578, 581, 584, 588.

[22] [1945] N.I. 155; 26 T.C. 319.

[23] (1805) 10 Ves. 522, 539–540.

[24] [1959] Ch. 220; [1958] 3 W.L.R. 701; [1958] 3 All E.R. 465.

[25] 97 L.J.K.B. 578, 587.

Even if one does not stop at the regulation of the profession, but looks at the results which that regulation tends to produce, there are still two objects of the appellant body, neither of which can be given any priority.

To summarise the charity contentions, the main or only object of this body is the keeping of a register of names in the manner prescribed by the Act, and the motive of Parliament in passing the Act is irrelevant; so are the results which flow from the activities of the council or which may be presumed to flow from them. The objects or the main object of the council cannot be charitable, because (1) the nature of the body itself precludes one from saying that it holds its property on charitable trusts, and (2) the regulation of a profession, though highly beneficial to the public, is not an object analogous to anything in the Statute of Elizabeth I. No distinction can be drawn between one profession and another. If, contrary to what is submitted, one does seek to find the object of this body in the presumed results of its activities, one cannot dismiss the professional advantages conferred on nurses by the Act as merely subsidiary or incidental. The case of the *General Medical Council* [30] is indistinguishable and should not be overruled, especially having regard to the length of time which it has stood.

As to the social welfare point, it is accepted that the legislature in the Act of 1955 did not confine section 8 (1) (*a*) within the bounds of charity but extended its scope beyond that. *Baddeley's* case [31] led to this extension. In the case of social welfare the objects need not be analogous to those in the Statute of Elizabeth I.

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[26] [1951] Ch. 70, 72–73; 66 T.L.R. (Pt. 1) 519; [1950] 2 All E.R. 466; (C.A.) [1951] Ch. 486; [1951] 1 T.L.R. 629; [1951] 1 All E.R. 494; (H.L.) [1952] A.C. 631, 651 et seq.

[27] [1958] 1 W.L.R. 95.

[28] 97 L.J.K.B. 578.

[29] 1929 S.C. 664, 677; 14 T.C. 645, 660–661.

[30] 97 L.J.K.B. 578.

[31] [1955] A.C. 572.

If the advancement of social welfare were to be equated with the benefit of the public, that would be fatal to the respondents. But that is too wide and was not suggested by the appellants. "The advancement of social welfare" is a narrower term than "calculated to benefit the public." A barrister at a legal aid centre gives free legal advice. He is concerned with social welfare, though that is not charitable. The same barrister in his chambers giving the same advice for a fee is not concerned with social welfare. Both the persons advised are in need of relief, but it is the manner of giving it that is material. Similarly, if a benevolent gentleman paid a nurse to give attention to poor people on his estate, that would be in the nature of social welfare; but if the people in the district clubbed together for a fund to pay a nurse to visit them, that would not be in the nature of social welfare and they would not be concerned with the advancement of social welfare. That distinction is the basis of the decision in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council.*[32] To train lawyers or nurses to be more efficient is not a matter of social welfare, although it may be for the benefit of the community. They may sometimes engage in social welfare and sometimes not. "Concerned with" does not mean "mixed up with" but "directed to." The Royal College of Surgeons is a charity, but it is not concerned with social welfare. A necessary element of social welfare is that a service should be provided gratuitously or for less than cost. The contrast is between work done as a matter of business and work not so done.

The words "or are otherwise," etc., in section 8 (1) (*a*) mean "or, though not being charitable, are nevertheless concerned "with the advancement of religion, education or social welfare." Not all charities are concerned with social welfare.

E. B. Stamp following. Section 30 of the Nurses Act throws light on the solution to the question whether or not this council should be regarded as a charitable organisation and also what its purposes are. It contains a rule-making power "with respect "to any matters with respect to which the council think that "provision should be made for the purpose of carrying this Act "into effect." The power is wide. Under section 32 rules must be approved by the Minister. There are strong indications that Parliament did not intend this body to be regarded as charitable, since the rule-making power is limited to the purpose of carrying the Act into effect. If in the constitution of a charity there was a power to make rules tending to the relief of sickness, one would conclude that the purpose of the organisation was the relief of sickness. Similarly, this power shows the purpose for which the council is established. If there were a wider purpose of relieving sickness or promoting the interests of the community, one would expect the rule-making power to be directed to that.

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[32] Ante, 293, 311–312; [1958] 3 W.L.R. 172, 182–183, 190.

G. D. Squibb Q.C. in reply. The fundamental difference between the parties is that whereas the appellants seek to ascertain the main objects of the organisation, the respondents would not look beyond the Nurses Act. Their method is fundamentally different from the approach in the case of the *Royal College of Surgeons*,[33] where there were no stated objects but only various powers and duties set out in the body of the charter. If the respondents were right, only the operative parts of the charter should have been looked at. See also the *Pig Marketing Board* case.[34]

The respondents contended that a body like this cannot be brought before the court to have its affairs regulated, and that therefore it cannot be a charity, but that is not the test of a charity: see the case of the *Shipwrecked Fishermen*[35] and Halsbury's Laws of England, 3rd ed., vol. IV, p. 417. The council may be a charity although the court may not be able to interfere with it in respect of matters laid down by the Act.

As to what is analogous to the objects laid down in the Statute of Elizabeth I, one may distinguish between one profession and another, since some professions do work which is analogous to the objects laid down in the statute, while others do work which may be beneficial to the public but not in a way analogous to the objects set out in the statute. Because nursing is concerned with objects analogous to those set out in the statute it comes within the scope of charity. It is a question of construction whether or not the advantages to nurses are ancillary. If the object of the council is to keep a register and regulate the profession, one must ask whether it is concerned with the benefit of the nurses or with securing that sick persons shall be better nursed. The latter is the object.

As to the respondents' illustration of the barrister giving advice, one must not confuse charities for the relief of poverty with other charities. Giving legal advice is not in itself charity, because it is not for the relief of poverty.

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[33] [1952] A.C. 631, 641.

[34] [1945] N.I. 155, 159; 26 T.C. 319, 333.

[35] [1959] Ch. 220, 227.

Admittedly a nurse paid by a rich patient is not engaged in social welfare towards that patient at that moment. But the nursing profession is directed to the relief of suffering humanity in general, and that is social welfare. Social welfare involves the benefit of humanity in general or a considerable section of it.

Their Lordships took time for consideration.

LORD MORTON OF HENRYTON. My Lords, I shall hereafter refer to the appellants as " the council."

The only issue on this appeal is whether the council is entitled to partial relief from rates pursuant to section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. I shall refer to that Act as " the Rating Act of 1955." The material part of section 8 is as follows:

" Provisions as to rates payable by charitable and other " organisations.

" 8.—(1) This section applies to the following hereditaments, " that is to say—(*a*) any hereditament occupied for the purposes " of an organisation (whether corporate or unincorporate) which " is not established or conducted for profit and whose main objects " are charitable or are otherwise concerned with the advancement " of religion, education or social welfare; (*b*) any hereditament " held upon trust for use as an almshouse; (*c*) any hereditament " consisting of a playing field (that is to say, land used mainly or " exclusively for the purposes of open-air games or of open-air " athletic sports) occupied for the purposes of a club, society or " other organisation which is not established or conducted for " profit and does not (except on special occasions) make any " charge for the admission of spectators to the playing field: " Provided that this section shall not apply to any hereditament " to which section 7 of this Act applies, or to any hereditament " occupied by an authority having, within the meaning of the " Local Loans Act, 1875, power to levy a rate."

The remaining subsections grant certain reductions in the rates chargeable in respect of any hereditament to which the section applies.

The council is a body corporate established by the Nurses Registration Act, 1919, and now has the powers and duties conferred and imposed on it by the provisions of the Nurses Act, 1957, which consolidates the Act of 1919 and certain subsequent Acts.

It is common ground between the parties that the powers and duties of the council under the Act of 1957 do not differ in any material respect from its powers and duties at the time when the Rating Act of 1955 became law.

It is also common ground between the parties that the council is "an organisation which is not established or conducted for "profit," but it has to be determined, on this appeal, whether its "main objects" are such as to bring it within section 8 (1) (*a*) of the Rating Act of 1955. The council is, and was at all material times, the rateable occupier of premises known as Nos. 17 and 23–25, Portland Place, in the Metropolitan Borough of St. Marylebone. These premises are occupied for the purposes of the council. The respondents, who are the rating authority for that borough, refused to recognise the council as an organisation such as is mentioned in section 8 (1) (*a*) of the Act. Danckwerts J. granted the council a declaration that it is such an organisation. but his decision was reversed by the Court of Appeal.

Having regard to the decision of the Court of Appeal in *General Medical Council* v. *Inland Revenue Commissioners* [1] and to the decision of the Court of Session in *General Nursing Council for Scotland* v. *Inland Revenue Commissioners*,[2] it was not contended before Danckwerts J. and the Court of Appeal that the council can be regarded as an organisation whose main objects are charitable, and the judgments of Danckwerts J. and the Court of Appeal were solely concerned with the question whether the main objects of the council are "otherwise concerned with the "advancement of social welfare." In this House it was contended on behalf of the council that its main objects are charitable or, in the alternative, are otherwise concerned with the advancement of social welfare.

My Lords, it is thus apparent that in order to decide the issue between the parties it is necessary to decide the following questions: (1) What are the "main objects" of the council within the meaning of section 8 (1) (*a*) of the Rating Act, 1955? (2) Are these main objects charitable? (3) If not, are these main objects "otherwise concerned with the advancement of social "welfare"?

It is, of course, possible that the council has only one main object, but if it has more than one it will not be an organisation within subsection 8 (1) (*a*) unless all its main objects come within that subsection.

[1] (1928) 97 L.J.K.B. 578; 44 T.L.R. 439.

[2] 1929 S.C. 664; 14 T.C. 645.

In order to answer the questions just stated, it is necessary to consider the provisions of the Nurses Act, 1957, in some detail, since, in accordance with modern custom, there is no preamble to the Act, and the objects of the council can only be ascertained by a study of these provisions.

Section 1 (1) of the Act is as follows: " The body established " by section 1 of the Nurses Registration Act, 1919, by the name " of the General Nursing Council for England and Wales shall " continue in existence by that name and shall have such powers " and duties as are conferred and imposed on them by the " following provisions of this Act."

Section 1 (2) and Schedule I state what the constitution of the council is to be.

Section 2 is as follows: " (1) It shall be the duty of the " council—(*a*) to maintain, in accordance with rules in that behalf " made by them, a register of nurses established in pursuance of " the Nurses Registration Act, 1919, which shall consist of— " (i) a general part containing the names of all nurses who satisfy " the conditions of admission thereto; (ii) a part containing the " names of nurses trained in the nursing and care of persons " suffering from mental diseases; (iii) a part containing the names " of nurses trained in the nursing of sick children; and (iv) such " other parts as may be prescribed; (*b*) to maintain, in accordance " with rules in that behalf made by them, the roll of assistant " nurses established in pursuance of Part I of the Nurses Act, " 1943. (2) Where a person satisfies the conditions of admission " to a part of the register other than the general part, his name " may be included in that other part notwithstanding that it is " also included in the general part. (3) A certificate under the " seal of the council duly authenticated stating that a person is, " or was at any date, or is not, or was not at any date, duly " registered or enrolled shall be evidence in all courts of law of " the facts stated in the certificate."

Under section 3 (1) the council is to " make rules for regu- " lating the conditions of admission to the register and to the roll " respectively and the conduct of any examinations which may " be prescribed as a condition of admission thereto and any " matters ancillary to or connected with any such examinations, " and any such rules shall contain provisions—(*a*) requiring, as a " condition of the admission of any person to the register or the " roll, that that person shall have undergone the prescribed train- " ing, and shall possess the prescribed experience, in nursing; " and (*b*) requiring that the prescribed training shall be carried

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"out either in an institution approved by the council in that "behalf or in the service of the Admiralty, the Army Council or "the Air Council."

The section also provides for the payment to the council, in respect of applications for examination, registration or enrolment, such fees as the council may, with the approval of the Minister of Health, from time to time determine.

In section 4 there is provision for the registration of nurses trained abroad, and in section 5 there is provision for a list of persons neither registered nor enrolled, who completed a course of nursing in a satisfactory institution before July 1, 1925. Section 6 deals with the admission to the register of certain persons there specified.

Section 7 provides for the council making rules concerning removal from, and restoration to, the register, roll and list. Under section 10: "The council shall make rules providing for "the issue of certificates to persons registered or enrolled and "with respect to the uniform or badge which may be worn by "persons registered and persons enrolled respectively."

Sections 11 to 16 inclusive deal with the training of nurses. It is, I think, sufficient to set out section 11 (1) to (3)—

"11.—(1) The Minister shall by order constitute, in accordance "with Schedule II to this Act, a committee (in this Act referred "to as an 'area nurse-training committee') for each hospital "area; and before making an order under this subsection with "respect to any such area the Minister shall consult with the "council. (2) It shall be the duty of the area nurse-training "committee for a hospital area—(*a*) to have constant regard, as "respects persons engaged in the area in the training of nurses, "to the methods employed by those persons of training nurses; "(*b*) to promote, with a view to securing the improvement of "methods employed in the area of training nurses, research and "investigation into matters relating to the training of nurses, and "to render to the council reports of the results of research and "investigation promoted by the committee; (*c*) to advise and "assist—(i) hospital management committees appointed by the "regional hospital board for the area; (ii) boards of governors of "teaching hospitals situated in the area; and (iii) any other "authority or person engaged in the area in the training of nurses "who makes a request in that behalf to the committee; in the "preparation and carrying out of schemes for the training of "nurses in accordance with any requirements of the council for the "time being in force with respect to the training to be undergone

" by persons as a condition of their admission to the register or " the roll; and (*d*) to advise and, if requested by the council so " to do, to assist the council in matters relating to the approval " by the council, for the purposes of the training rules, of institu- " tions situated in the area. (3) An area nurse-training com- " mittee may, if authorised by the council so to do, conduct on " their behalf any examination prescribed by rules made by the " council under section 3 of this Act or specified in a scheme " adopted under the next following section."

No provision in this group of sections requires or enables the council itself to train nurses. By section 15 all expenses incurred by an area nurse-training committee with the approval of the council are to be defrayed by the council, but with this should be read section 26, which provides that: " All expenses incurred " by the council with the approval of the Minister which are " attributable to defraying expenditure incurred by area nurse- " training committees (other than expenditure incurred by such " committees in conducting examinations on behalf of the council) " shall be defrayed by the Minister out of moneys provided by " Parliament, and all other expenses incurred by the council " under this Act shall be defrayed by the council."

Section 23 enables the council to charge fees for certain services to nurses and others.

Section 27 provides for penalties for false assumption of the title of registered or enrolled nurse, and section 28 imposes penalties for the use of the title " nurse " by anyone who is not a duly registered nurse or assistant nurse.

Section 30 confers on the council power to " make rules for " prescribing anything which by this Act is required or authorised " to be prescribed and generally for making provision with respect " to any matters with respect to which the council think that pro- " vision should be made for the purpose of carrying this Act into " effect." Rules have in fact been made under the provisions of that section, but no rule made by the council under the Act can come into operation unless and until it is approved by the Minister of Health.

I would accept, as a convenient summary of the provisions of the Act, the words of the Master of the Rolls[3]: " It is, in our " judgment, sufficient and sufficiently accurate to state that the " purposes and functions of the council were and are to maintain " a register of nurses, together with a roll of assistant nurses; to

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[3] [1958] Ch. 421, 429; [1957] 3 W.L.R. 1039; [1957] 3 All E.R. 685.

"regulate accordingly the conditions of admission to and removal "from the register and the roll, and, in connection therewith, to "exercise supervisory and directing powers in regard to training "and examinations; and to exercise such other powers and duties "as are ancillary to and consequent upon the foregoing. The "income of the council appears to be in part derived from fees "which the council are authorised to charge upon applications for "examination and registration or enrolment and the like, and "as to the rest from moneys directly or indirectly provided by "Parliament."

In considering what are the main objects of the council, in the light of all the provisions of the Act, and whether these objects are charitable, it is right to turn first to the cases of *General Medical Council* v. *Inland Revenue Commissioners* [4] and *General Nursing Council for Scotland* v. *Inland Revenue Commissioners* [5] already mentioned. In the former case the Court of Appeal held that the General Medical Council was not "established for charitable purposes only" within section 37 (1) (*b*) of the Income Tax Act, 1918. Mr. Squibb, for the appellant council in the present case, submitted that the *General Medical Council* case [6] was distinguishable on its facts from the present case; alternatively, that it was wrongly decided.

My Lords, I shall not detain you by endeavouring to summarise the provisions of the statute which established the General Medical Council. Suffice it to say that although there are certain differences between its provisions and the provisions of the Nurses Act, 1957, the two cases are, to my mind, indistinguishable as regards the main object of the bodies incorporated by these Acts respectively.

In the *General Medical Council* case [7] Sargant L.J. said: "I "think myself that the whole scheme of this legislation is to regulate the profession of medical men, who in consequence have "certain privileges conferred upon them by the legislation, and "that it is in the first instance as a professional measure that the "legislation is to be regarded. No doubt, as I have said, the "result of that strict qualification and supervision will be to the "public advantage. Exactly the same thing might be said of "the regulations which govern the admission of qualified persons "to the ranks of solicitors and barristers, or any other scientific "profession. I agree with the Master of the Rolls that a very

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[4] 97 L.J.K.B. 578.

[5] 1929 S.C. 664.

[6] 97 L.J.K.B. 578.

[7] Ibid. 587–588.

"great deal is to be learnt from the judgments in the *Forrest* "case [8] with regard to the Institution of Civil Engineers, and "particularly in the distinctions which are drawn there by Lord "Watson between that case and the case with regard to the "Writers to the Signet. It seems to me that here we clearly have "an institution or society which is of the same nature as the "society known as Writers to the Signet, and that it differs from "the Institution of Civil Engineers." I agree with these observations, and, in my view, they can properly be applied to the appellant council in the present case. I think that the council, formed as it is to exercise statutory powers and discharge statutory duties, has only one main object, namely, to regulate the profession of nursing in the manner and to the extent set out in the Nurses Act, 1957. The *General Medical Council* case [9] was, in my opinion, rightly decided, and the object which I have just stated is not a charitable object, giving to the word "charitable" its meaning in law as established in many cases.

It follows from the view which I have just expressed that I cannot accept some of the expressions of opinion by the learned judges of the Court of Session in the case of the *General Nursing Council for Scotland* [10] as to the purposes for which that council was established, although I do not doubt that the court was right in following the *General Medical Council* case [11] and holding that the General Nursing Council for Scotland was not established "for charitable purposes only." Before I leave the question of charity, I ought to refer to the case of *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.* [12] In that case this House held that the college was in law a charity, because its object was "the due promotion and encouragement of the "study and practice of the art and science of surgery," words which appeared in the recitals to its charter. The case is thus clearly distinguishable from the present case.

I now turn to the last question arising on this appeal. Having regard to my opinion that the sole main object of the council is to regulate the profession of nursing, in the manner and to the extent set out in the Nurses Act, 1957, that question must now be restated as follows: Is that object, which is not charitable in the legal sense, "otherwise concerned with the advancement of "social welfare"? My Lords, this is, to my mind, a question of great doubt, and I have found it difficult to choose between the two lines of argument so ably presented in this House; but in the end I find myself in agreement with the views which are about to be expressed on this point by my noble and learned friend, Lord Keith of Avonholm.

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[8] (1890) 15 App.Cas. 334; 6 T.L.R. 456.

[9] 97 L.J.K.B. 578.

[10] 1929 S.C. 664.

[11] 97 L.J.K.B. 578.

[12] [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.

I would answer this last question in the negative and would dismiss the appeal.

LORD TUCKER. My Lords, in order to succeed in this appeal the appellant council has to establish that it is an organisation whose main objects are charitable or are otherwise concerned with the advancement of social welfare. It was conceded by counsel in the courts below that, in view of the decision of the Court of Appeal in *General Medical Council* v. *Inland Revenue Commissioners*,[13] he could not argue that the main objects of the council were charitable, but he formally took the point in order to enable him to contend in this House that the last-named case was wrongly decided. In my opinion it was not open to him in these circumstances to invite your Lordships to distinguish the present case from that of the General Medical Council, and I did not understand him to do so. I would add, however, that having examined the facts in each case I am satisfied that there is not sufficient ground for differentiation, nor am I persuaded that the decision in the *General Medical Council* case was wrong.

My Lords, my noble and learned friend on the Woolsack has examined the provisions of the Nurses Act, 1957, and my noble and learned friend, Lord Keith of Avonholm, whose opinion I have had the advantage of reading, will also give a detailed examination of the Act. I therefore content myself with stating that such examination in my view discloses that the main objects of the council are (1) to maintain a register of nurses and roll of assistant nurses, and (2) to make rules regulating the conditions of admission to the register and roll, neither of which, as distinguished from the ultimate benefits which may be expected to result from the legislation, are to be regarded as charitable.

With regard to the second limb of section 8 (1) (*a*) of the Act of 1955, which, in my view, can only be invoked if and when it has been decided that the main objects of the organisation are not charitable, I agree with the opinion which my noble and learned friend, Lord Keith of Avonholm, will shortly express.

I would accordingly dismiss the appeal.

[13] 97 L.J.K.B. 578.

Lord Cohen. My Lords, the questions which your Lordships have to decide are two—(1) Are the main objects of the council charitable? If not, (2) Are they "otherwise concerned with the "advancement of . . . education or social welfare" within the meaning of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955?

Strictly speaking, it might suffice to answer the second of those questions, but, as both were fully argued before your Lordships, I think it better to express my opinion on both questions.

Mr. Cross submitted that the only main object of the council is the keeping of the register with subsidiary duties of prescribing, training and conducting examinations, and that this is not a charitable object.

I cannot take so narrow a view of the Act. Looking at it as a whole, I think there were two main objects, on the one hand the enhancement of the qualities and status of nurses and, on the other, the benefit and protection of the public, particularly of the sick. I borrow this statement of the purpose of the Act from the judgment of the Master of the Rolls. He did not have to consider the question whether on this basis the main objects of the council were charitable, since it was admitted in the Court of Appeal that having regard to the decision of this court in *General Medical Council* v. *Inland Revenue Commissioners* [13] and of the Scottish Court of Session in *General Nursing Council for Scotland* v. *Inland Revenue Commissioners* [14] the Court of Appeal could not hold that the objects of the council were charitable. Before us, however, Mr. Squibb submitted that the Scottish case was distinguishable, and that the *General Medical Council* case [15] was wrongly decided and could not be reconciled with the decision of this House in the case of *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.*[16] In the last-mentioned case the majority of their Lordships were able to find that the main object of the college was the improvement of the art and practice of surgery, and that in so far as these were provisions which might be directed to the enhancement of the status of surgeons or the protection of their professional interests they were purely ancillary. Their Lordships were therefore able to hold that the college was a charity. I was a dissentient in that case, but I accept, of course, the decision then reached. In the present case, however, I think it is impossible to hold that the enhancement of the qualities and status of nurses is a mere ancillary object of the council. It is, I think, a main object and it is not charitable. I would answer the first question I have stated in the negative.

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[13] 97 L.J.K.B. 578.

[14] 1929 S.C. 664.

[15] 97 L.J.K.B. 578.

[16] [1952] A.C. 631.

But, although the enhancement of the qualities and status of nurses is not a charitable object, it does not necessarily follow that it is not "otherwise concerned with the advancement of . . . "education or social welfare." The Court of Appeal held that it was not, but I am unable to agree with them.

On this point I have had the opportunity of reading in print the speech which will in due course be delivered by the noble and learned Lord, Lord Somervell of Harrow. I agree so fully with him that I shall state quite shortly my reasons for differing from the Court of Appeal. I agree with the Master of the Rolls that not every organisation established for benefiting the public can be treated as one the main objects of which are concerned with the advancement of social welfare. It is not easy to define exactly the meaning of social welfare, but I am prepared to agree with Mr. Squibb that social welfare includes the relief of persons or classes of persons who by reason of their circumstances are in special need of relief of a kind analogous to that contemplated by the Statute of Elizabeth. I think that an organisation established for the purpose of assisting in the provision of such relief is an organisation concerned with social welfare within the meaning of section 8 of the Act of 1955.

Now, what is the position of the council? I would adopt the language of the Lord President (Lord Clyde) in *General Nursing Council for Scotland* v. *Inland Revenue Commissioners*,[17] where he said: ". . . its object was to raise the standard of sick-"nursing in Great Britain." In view of what I have already said I must, however, qualify his statement by adding that the council has also the object of enhancing the status and qualities of nurses.

Now the nursing of the sick is, in my opinion, relief plainly analogous to that contemplated by the Statute of Elizabeth, and if the provision of skilled nurses for the nursing of the sick had been the sole object of the council, I cannot doubt that it would have been "otherwise concerned with . . . social welfare" within the meaning of the section. It is said that the professional aspect of the other objective, "the enhancement of the status and quali-"ties of nurses," excludes the council from the benefit of the section. But the two objects are, as was said by the Master of the Rolls, essentially inseparable. If I had to say which was "primus

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[17] 1929 S.C. 664, 677; 14 T.C. 645, 660.

"inter pares," I should unhesitatingly choose the protection of the public by the provision of skilled trained nurses. Moreover, the council has an educational flavour through its responsibilities in connection with training and examinations. In these circumstances, it seems to me that both the main objects of the council are concerned with social welfare, and that your Lordships would be placing too narrow a meaning on the wide words of the section if your Lordships were to exclude the council from the relief granted by the section merely because the aspect of good works to which the Master of the Rolls refers is missing from its functions.

I would allow the appeal.

LORD KEITH OF AVONHOLM. My Lords, on the view I take, this case lies within a very short compass. For a time I thought it might be decided on the broad ground that, to use the words of Lord President Clyde in *General Nursing Council for Scotland* v. *Inland Revenue Commissioners*,[17] the object of the appellant council "was to raise the standard of sick-nursing." I have come to the view, however, that that would be to proceed on a false premise. For one thing, the statement is something in the nature of a surmise or speculation. There is nothing in the Nurses Act, 1957, or its statutory precursors, that says this is the object of the council. There may be some, if not many, for all I know, who would say that the standard of sick-nursing was as high 50 years ago as it is today. It may be that one result of the Act is to increase the number of persons who reach the standard. But that again may be no more than the result of economic, social and political changes in the structure of society. There are other surmises that are equally possible, as, for instance, that the purpose was to improve the status and protect the profession of nurses.

In my opinion, the only way by which the main objects of the appellant council can be ascertained is by looking at the objects as expressed in the Act. It is by the language used that Parliament has expressed its intention, and it is with the objects for which the council was immediately and directly constituted that we are, in my opinion, concerned, and not with the results of its activities at second or third hand.

When I turn to the Act I find only two main objects for which the council was constituted. First, it has to maintain a register of nurses, a roll of assistant nurses and the list of persons, neither registered nor enrolled, who within two years of the passing of the Nurses Act, 1943, were admitted to the list in respect of training in nursing prior to July, 1925. Copies of the register, the roll and the list are to be open for inspection by the public. Its second main function is to make rules for regulating the conditions of admission to the register and to the roll, and the conduct of examinations which may be prescribed as a condition of such admission. These conditions are to include prescribed training and prescribed experience in nursing, and the prescribed training shall be carried out in an institution approved by the council or in the service of the Admiralty, the Army Council or the Air Council. These rules must be approved by the Minister of Health and are incorporated in a statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament. These two functions are undoubtedly closely related, and it might be possible to express them as one object, but I am content to take them as two objects. Everything else in the Act affecting the council is, in my opinion, properly incidental to these two main functions.

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[17] 1929 S.C. 664, 677.

It may be observed that though the council prescribes the course and syllabus of training and approves the training institutions, area nurse-training committees are separately constituted by the Minister to concern themselves with the training of nurses and to advise and assist hospital management committees and boards of governors of teaching hospitals, and other authorities and persons engaged in the training of nurses, in the preparation and carrying out of schemes for such training in accordance with the council's requirements. The cost of training incurred by hospital management committees and teaching hospitals is defrayed by the nurse-training committees, who recover the amount from the council, who in turn recover the money from the Minister out of moneys provided by Parliament. In my opinion the functions of the area nurse-training committees stand apart from those of the council though they are, of course, helpful to the council in securing the entry of properly qualified nurses to the register and the roll.

It may be further observed that the council, being a statutory body, is strictly confined within its powers as fixed by the statute, and at various points can only act with the approval of the Minister. It must report annually to the Minister as to the discharge of its functions with respect to the training of nurses and the Minister must lay the report before Parliament. In my opinion, the respondents are right in their submission, as stated in the first reason in their case, that the appellants are established for the purpose of exercising statutory powers and carrying out statutory duties relating to the keeping of a register of nurses, if it be remembered that one of these duties is concerned with the training of nurses, in so far as the council has to prescribe courses of training and approve training institutions under section 3 of the Act, in order that nurses may achieve the standards of knowledge and experience necessary for admission to the register or roll.

The question is whether the two objects to which I referred at the outset "are charitable or are otherwise concerned with the "advancement of religion, education or social welfare." The first of these main objects, the registration of nurses, if considered by itself, clearly could not, in my opinion, be regarded as either charitable or concerned with social welfare. But, it is said, the conditions as to training and experience imposed as a prerequisite of registration make the council a charitable organisation, because these conduce to the advancement of the nursing of sick persons, which is a charitable object. But assuming for the moment that this is a consequence of imposing these conditions, that cannot, in my opinion, be said to be the reason why they were imposed. The reason was to secure that only properly qualified persons should be registered. That clearly was the direct object indicated by the Act. We are not concerned with indirect consequences nor entitled to speculate on what ultimate purposes, if any, Parliament had in view. Apart from this, the hypothesis of the appellants may, I think, be questioned. In the days when hospitals trained their own nurses, independently of outside regulation, and were treated as charitable institutions, it was not, as I understand it, because they trained nurses for sick-nursing that they were treated as charitable institutions, but because they were established for nursing the sick poor. The present case is not like that of the *Royal College of Surgeons*,[18] whose objects were the due promotion and encouragement of the study and practice of the art and science of surgery. So far as the Nurses Act guides us the council was created to provide a register and roll of nurses and impose rules to secure that they were properly qualified for admission. The Act expressly states in section 3 (2) (*b*), as one of its aims, to secure a uniform standard of qualification in all parts of the United Kingdom. I have no doubt the Act was of public benefit, as one must assume most legislation to be. But the question is: Was what the council was created to do and does charitable? I cannot hold that it was. It may be that at some distance more or less remote what it does redounds to the interests and benefit of charitable organisations. So is it when a benefactor does something for a charity. But that does not create him a charity. The test of the matter, in my opinion, is to consider the content, or character, of the functions discharged by the council and ask, Are these charitable? I cannot hold that they are.

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[18] [1952] A.C. 631.

I have not referred so far to the sections of the Act which make it an offence for a person not duly registered to take or use the name or title of "registered nurse," or for a person not duly enrolled to pass herself off as an enrolled assistant nurse, or for a person to use the name or title of "nurse" (with certain exceptions) who is neither a registered nurse nor an enrolled assistant nurse. If it is legitimate to look at the effect of the Act at all, as distinct from the actual functions imposed by the Act on the council and their content, it appears to me to be easier to say that one of its results was to raise the professional status of nurses and to protect them in the exercise of their profession, than to say the result was to advance the nursing of sick persons. From this point of view I think the case is indistinguishable from *General Medical Council* v. *Inland Revenue Commissioners*.[19] I think also, as Rowlatt J. (with whom Lord Hanworth M.R. was prepared to agree) thought in that case, that the present case is just another instance of an organisation performing administrative functions under Parliamentary authority which, though for the public benefit, can in no sense be regarded as of a charitable nature. I agree with those of your Lordships who think that that case was rightly decided.

I turn now to consider whether the council comes under the other limb of section 8 (1) (*a*) of the Act of 1955 as being an organisation whose main objects "are otherwise concerned with "the advancement of . . . social welfare." The considerations which influenced me on the charitable aspect of the matter seem to me to be equally applicable here. However wide a meaning is given to "social welfare" or to "the advancement of social "welfare," the objects or functions of the council, in my opinion, are not concerned with either. Danckwerts J., taking the view apparently that the council was established in the general public interest, held that it came within the subsection. "It was not "established," he said,[20] "as it seems to me, for the purpose "of raising the professional status of the nurses, but for the "purpose of creating a system of registration so as to prevent

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[19] 97 L.J.K.B. 578.

[20] [1957] 1 W.L.R. 941, 946–947; [1957] 2 All E.R. 791.

"incompetent nurses being able to victimise the public, and for "making sure that the public should receive the services only "of competent nurses. That seems to me to be the establishment of a body for the purpose of benefiting the public, and, "therefore, for a purpose, as it seems to me, of social welfare." But, accepting the hypothesis on which he bases his conclusion, I cannot accept public benefit as the test of social welfare, though social welfare may be a public benefit, and the appellants' counsel were not able to support this view of the learned judge. I would accept the words of the Master of the Rolls where he says[21]: "It is not enough that the objects of the organisation are in some "degree related to the advancement of social welfare; they must "in a real sense be directed to it." For the reasons I have given the objects of the council are not, in my opinion, "directed" to social welfare.

If I had felt myself competent to take a different view the appellants would still have been faced with a difficulty. It could not, in my opinion, be said that the mere keeping of a register or roll of nurses was an object concerned with the advancement of social welfare. It would have to be said that this was merely incidental to the one and main object of the council, to secure the proper training of nurses, which was an object of social welfare. This, to my mind, would be to put a forced construction upon the Act. A more natural construction, I think, would be that the main object is to maintain a register and roll and that the other was ancillary to that purpose. But on the assumption that there are two main objects, one of which is concerned with the advancement of social welfare and the other is not, it would be impossible. in my opinion, to say that the "main objects" were concerned with the advancement of social welfare.

For the other reasons, however, which I have already stated, I would dismiss the appeal.

LORD SOMERVELL OF HARROW. My Lords, section 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act is framed in words capable of a very wide construction. I cannot think it would be possible to replace them by some other words without altering what Parliament has enacted. I accept what was said by Lord Denning in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*[22]: "The main objects which "are 'otherwise' concerned must, I think, be objects that are

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[21] [1958] Ch. 421, 434.

[22] Ante, 293, 321; [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.

"akin to charitable objects—have some kindred quality with "charitable objects."

In considering the objects or object of the General Nursing Council one must consider the Act. In considering the substantially similar position of the General Nursing Council for Scotland Lord Clyde said: "If I tried to define the council's purpose in a "single sentence, I should say its object was to raise the standard "of sick-nursing in Great Britain" (*General Nursing Council for Scotland* v. *Inland Revenue Commissioners* [23]). In that case the question was whether the council was a charity. It was held it was not because the objects included a protection of the calling as well as the education of nurses and improvement of nursing. We have not to consider here whether the council is a charity. Even under the first part of the subsection it is sufficient if the main object or objects are charitable. I therefore get little, if any, assistance from the decision in the case cited or from *General Medical Council* v. *Inland Revenue Commissioners*.[24] I think the question here is whether the objects of the council are for the advancement of social welfare, in the somewhat limited sense stated above. If so, it does not matter whether those objects are charitable in the legal sense or not. I would assume the subsection was framed so that valuation officers could apply it without getting embogged in the technicalities of the law relating to charities.

I would amplify Lord Clyde's statement by reference to the Act. The council has to prescribe the training and experience and to regulate the conduct of examinations to be prescribed. The rules provide for a period of three years' training, for a general register, for a register for mental nurses, for children's nurses and for fever nurses (S.I. 1951, No. 1372, r. 16). There is a syllabus for the preliminary and final examinations (loc. cit. Schedule III) which shows the width and amount of knowledge required. The council has to approve the institution in which training is to be carried out, apart from State military hospitals. Section 11 provides for the setting up by the Minister of "area "nurse-training committees" which are to prepare and carry out schemes in accordance with any requirements of the council. A person who is not on the register cannot use the name or title of "nurse," with a proviso excepting children's nurses.

In my opinion, the advancement of the care of the sick is an advancement of social welfare within the section. I agree with

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[23] 1929 S.C. 664, 677; 14 T.C. 645, 660.

[24] 97 L.J.K.B. 578.

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Danckwerts J. that there is nothing in the section or the English language to indicate that only poor persons are to be regarded as a subject of social welfare. It was, of course, in earlier days the poor who suffered most from the absence of adequate nursing. I would have thought it clear that the primary object was to promote and improve the art and practice of nursing. It may be that this could have been attained without the privilege to which I have referred being conferred on those on the register. I therefore accept the finding of the Court of Appeal that there are two main objects. This is a public Act and I would have regarded the improvement of nursing as the primary object. I would myself have thought that Parliament improved and protected the status of those who nursed, as a means of improving nursing, but I am prepared to accept this improvement and protection as a main object within the subsection and not as merely subsidiary. I do not get much assistance from the fact that the provisions of the Act can be described as regulating the nursing profession. If a profession is within the social welfare field, its regulation may be the best means for the advancement of social welfare. It will depend on the nature of the regulation. In the present case, and here I differ from the Court of Appeal, I hold that the enhancement of the status of nurses as provided by the Act is in itself for the advancement of social welfare. Both main objects, therefore, are within the subsection. I would, therefore, allow the appeal.

Appeal dismissed.

Solicitors: *Pontifex, Pitt & Co.; Sharpe, Pritchard & Co.*

F. C.

CYRIL VERNAL UDALAGAMA . . . APPELLANT;

AND

IRANGANIE BOANGE . . . . . RESPONDENT.

J. C.*
1959
July 29.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Breach of promise—Basis of action—Statutory requirement of promise "in writing"—Express written promise essential—Written evidence of previous oral promise insufficient—Limited admission of

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* *Present*: LORD REID, LORD TUCKER, LORD SOMERVELL OF HARROW, LORD DENNING and the RT. HON. L. M. D. DE SILVA.

extrinsic evidence—Marriages (General) Ordinance (Legislative Enactments of Ceylon, 1938, *c.* 95), *s.* 19 (3), *proviso.*

By the proviso to section 19 (3) of the Ceylon Marriages (General) Ordinance (c. 95 of the Legislative Enactments of 1938): ". . . no action shall lie for the recovery of damages for breach of "promise of marriage, unless such promise of marriage shall have "been made in writing":—

Held, that the writing required to satisfy the Ordinance must contain an express promise to marry or confirm a previous oral promise to marry, i.e., admit the making of the promise and evince continuing willingness to be bound by it. The promise in writing may be contained in one or more documents, but documentary evidence which does not in express or other unequivocal terms contain a promise to marry is insufficient even though it may afford evidence of an oral promise to marry. Extrinsic evidence is only admissible where such evidence is permissible on general grounds, e.g., where the surrounding circumstances may explain some ambiguity or identify some person referred to in the writing.

Accordingly, where letters passing between the parties on which the plaintiff relied as containing a promise to marry did no more, on the construction most favourable to the plaintiff, than assume that a marriage would take place as a result of an oral promise, the action necessarily failed, extrinsic evidence being inadmissible to supply the deficiencies in the correspondence.

Jayesinhe v. *Perera* (1903) 9 N.L.R. 62 overruled.

Judgment of the Supreme Court of Ceylon, 57 N.L.R. 385 reversed.

Appeal (No. 14 of 1958) from a judgment and decree of the Supreme Court of Ceylon (Gratiaen and Swan JJ.) (November 25, 1955) reversing a judgment and decree of the District Court of Kegalle (March 10, 1954) which had dismissed an action by the present respondent against the appellant claiming Rs. 20,000 as damages for breach of promise to marry.

Family arrangements in respect of a proposed "arranged "marriage" of the parties fell through because the respondent's dowry of Rs. 5,000 and five acres of tea was not forthcoming, and the main question in this appeal was whether there was an independent promise "in writing" as required by the proviso to section 19 (3) of the Marriages (General) Ordinance, of Ceylon, which provided that ". . . no action shall lie for the recovery "of damages for breach of promise of marriage, unless such "promise of marriage shall have been made in writing." The respondent alleged that such promise was contained in letters which passed between her and the appellant in December, 1950.

The terms of the letters appear from the judgment of the Judicial Committee.

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1959. June 1, 2. *Sir Frank Soskice Q.C.* and *Ralph Millner* for the appellant. The Supreme Court awarded the plaintiff Rs. 5,000—the sum assessed by the District Judge as appropriate damages should the claim be successful. That is a comparatively small sum, but the gravity of the matter is that the appellant is a magistrate and his reputation is very much affected. The District Judge found that there was no oral promise to marry between the plaintiff and the defendant, which was a pure finding of fact, and the Supreme Court found to the contrary on that issue of fact. There was no adequate reason for the judges in the Supreme Court to disagree with the trial judge on that issue; they drew the inference that there was an express oral promise on inadequate grounds.

The second point is that under section 19 (3) of the Marriages (General) Ordinance of Ceylon " No action shall lie for the " recovery of damages for breach of promise of marriage unless " such promise of marriage shall have been made in writing," and it is submitted that that requirement was not satisfied by the three letters which were relied on by the plaintiff as constituting a promise in writing. The crucial matter is that mere corroboration in writing of an oral promise is not enough. The three questions are: was there a repetition in writing of a prior oral promise, or a promise in writing simpliciter, or a promise by necessary implication? Cases in Ceylon on this matter are *Beling* v. *Vethecan* [1]; *Mildred Fonseka* v. *Henry Silva* [2]; *Jayesinhe* v. *Perera* [3]; *Misi Nona* v. *Arnolis* [4]; *Philip* v. *Wettasinghe* [5] and *Karunawathie* v. *Wimalasuria*.[6] The last cited case takes a more restricted view of the meaning of the section, and, taking it as the most recent interpretation, it was decided on the basis that the promise must be in writing and made in no other way. The present letters do not fall within the principle of that case. It must be expressly said in the letter " I promise to marry you," and that is not the case here; one must be able to find that in the letter without guessing. *Abilinu Hamine* v. *Appuhamy* [7] carries the matter no further. [Reference was also made to *Cooray* v. *Cooray* [8] and *Ana Fernando* v. *Jokins*.[9]] English cases are not very close: *In re New Eberhardt Co., ex parte Menzies*.[10]

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[1] (1903) 1 A.C.R. 1.
[2] (1936) 1 C.L.J. 46.
[3] (1903) 9 N.L.R. 62.
[4] (1914) 17 N.L.R. 425.
[5] (1937) 38 N.L.R. 261.
[6] (1941) 42 N.L.R. 390.
[7] (1920) 21 N.L.R. 442.
[8] (1928) 30 N.L.R. 310.
[9] (1917) 30 N.L.R. 274.
[10] (1889) 43 Ch.D. 118; 5 T.L.R. 617.

For the purposes of this case it is sufficient to say that mere corroboration of a verbal promise is not enough; there is nothing in these letters which can be said to go beyond corroboration. The above comments on the facts are not relevant if the right view on the law is as submitted—that this appeal should be allowed because there was no written promise within the meaning of section 19 (3) of the Ordinance.

The respondent did not appear and was not represented.

July 29. The judgment of their Lordships was delivered by LORD TUCKER. In this case the respondent sued the appellant for damages for breach of promise of marriage. A good deal of oral evidence, conflicting on many points, and some documentary evidence was placed before the trial judge, who held that no written or oral promise to marry was established on the evidence before him. The greater part of the evidence related to the question whether there was an oral promise to marry. For reasons which appear later it will be seen that this evidence was immaterial to a decision of this case and should therefore have been excluded.

On appeal the Supreme Court held [1] that under the earlier decisions of that court an " action for damages lies if, in a letter " addressed by the defendant to the plaintiff, there is either con- " firmation or at least an unqualified admission of a subsisting and " binding oral promise of marriage." It held that the necessary elements existed and, setting aside the order of the District Judge, entered judgment for the respondent. The question is whether this ruling was correct.

It is convenient at this stage to state what in their Lordships' opinion is the law of Ceylon relating to the matter. An action does not lie in Ceylon for every breach of a promise to marry. A restriction is imposed by section 19 of the Marriages (General) Ordinance (Chapter 95, Legislative Enactments of Ceylon, Vol. III, p. 122), which, after making certain provision which has no bearing on cases of breach of promise, enacts as its final provision: " . . . no action shall lie for the recovery of " damages for breach of promise of marriage, unless such promise " of marriage shall have been made in writing." There is nothing further in the Ordinance or in any other statute which has a bearing on the point.

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[1] 57 N.L.R. 385, 392.

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Their Lordships are of opinion that the policy of the legislature has been to limit the cases in which an action can be brought to those in which the promise itself is in writing. It may be contained in one or more documents. Documentary evidence which does not in express or other unequivocal terms contain a promise to marry is insufficient even though it may afford evidence of an oral promise to marry.

Some confusion seems to have arisen in this case with regard to the meaning of such words as " evidenced in writing " and " confirmation." The distinction which must always be borne in mind is between writing which contains the promise to marry and writing which may afford corroboration of a previous oral promise. The latter, which is sometimes described as writing " which evidences a previous oral promise " is insufficient to support an action for breach of promise. The writing required to satisfy the Ordinance must contain an express promise to marry or confirm a previous oral promise to marry, i.e., admit the making of the promise and evince continuing willingness to be bound by it.

An illustration of a writing which, while not containing in itself a promise to marry, might be put forward as affording evidence in writing of an oral promise to marry is to be found in the case of a writing which says, " I assure you I will carry " out the promise I made last month." On such a writing the question at once arises, Was it a promise to marry, or a promise to lend money, or some other promise? The writing by itself only establishes that a promise was made. If it were possible to establish by oral evidence that the " promise made last month " was a promise to marry, the conflicts and uncertainties which may arise would be almost as much, if not quite as much, as in a case resting on oral testimony alone. In answer to oral evidence that it was a promise to marry, a contesting defendant may say it was a promise other than a promise to marry. Their Lordships are of the view that such a writing is insufficient to satisfy the statute.

The decision in *Jayesinhe* v. *Perera* [2] has been questioned in subsequent cases. Doubts have been expressed as to whether the writing relied on amounted merely to an admission in writing of a previous oral promise or was a repetition of the promise. If the word " repetition " imports an express promise to be bound by the previous oral promise this will suffice, but their Lordships

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[2] (1903) 9 N.L.R. 62.

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are unable to find this in the letter in question in that case which, in answer to a request for a written promise of marriage, said, " I am not agreeable to what papa says for this reason: " that is if I trust darling should not darling trust me? If they " have no faith in my word I cannot help it. If they don't " believe my word I am not to blame." This is in effect saying, " You must rest content with such remedy as is offered you by " an oral promise," and is an express refusal to give what the Ordinance requires. Their Lordships are accordingly of opinion that the decision cannot be upheld.

Extrinsic evidence is only admissible where such evidence is permissible on general grounds, e.g., where the surrounding circumstances may explain some ambiguity or identify some person referred to in the writing.

The basis of the judgment of the Supreme Court is to be found in the following passage[3]: " Does P.1, read in conjunction " with the letters D.7 and D.8, constitute a ' written promise ' " within the meaning of the proviso to section 19 (3)? The " Ordinance does not declare that oral promises of marriage are " null and void; it merely renders them unenforceable unless " they be evidenced in writing. The object is to avoid the risk " of vexatious actions based on perjured testimony. The earlier " authorities of this court were all discussed during the argument, " and it is settled law that an action for damages lies if, in a " letter addressed by the defendant to the plaintiff, there is " either confirmation or at least an unqualified admission of a " subsisting and binding oral promise of marriage. This is the " effect of *Jayesinhe* v. *Perera*,[4] *Misi Nona* v. *Arnolis*[5] and " *Karunawathie* v. *Wimalasuria*.[6] The letter P.1 completely " satisfies this minimum test."

Their Lordships have already indicated that the test referred to in this passage is not entirely satisfactory and has, in fact, given rise to differences of interpretation in its application.

As stated in the judgment of the Supreme Court,[7] " The " parties are well-educated Kandyan gentlefolk, and each of them " is the child of parents who hold conservative ideas on the " subject of marriage." Negotiations for a marriage between them took place in the manner customary to such persons and various things had been done including the fixing of a dowry to be given by the respondent's father. If a marriage had gone through,

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[3] 57 N.L.R. 392.
[4] 9 N.L.R. 62.
[5] (1914) 17 N.L.R. 425.
[6] (1941) 42 N.L.R. 390.
[7] 57 N.L.R. 386.

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the next step would have been a betrothal at which a certain ceremony would have been performed. This did not take place. It will appear from what is stated later that it is not necessary to examine the reasons for the failure. The parties saw each other and some letters passed between. Their Lordships will now examine the documentary evidence to ascertain whether a promise to marry can be said to be contained in it. Three letters were relied on, two from the respondent to the appellant and one from the appellant to the respondent. These are the documents referred to in the judgment of the Supreme Court as D.7, D.8 and P.1. The first is the following:

"Boange Walauwa,
"Kadugannawa.
"18.12.50

"My darling Teddy,

"I asked Mumy if I may write to you, and though she did "not say no, she does not like me corresponding fearing that "I might fall into trouble. But I thought it is my duty to "write to you, and keep to my promise inspite of any obstacle "standing in my way.

"The other day I was anxiously waiting to meet you before "leaving, but I had to come away with a heavy heart, as Daddy "came early. I am still feeling wretched without you. The "evenings are unbearable. When I think of you darling, I wish "I could fly back to you. I don't know how I will stay here "all alone till the 7th.

"I would have liked to spend even the whole holiday there, "but I have to please so many, with the result that I am "unable to do what I want. I hope you understand me, my "darling, and will not get angry with me for leaving you, "inspite of you worrying me so much to stay behind. To spend "even a minute with you is a great joy to me, though you seem "to think that I was impatiently waiting to come home.

"I am eveready to do anything for you, but unfortunately it "is my fate that I am forbidden to do all I can for you, whom "I love more than any one in this world. I know you always "think that I don't care for you because I say can't for anything "at all. Please don't think that I have no love for you, as I "will truthfully tell you that I really love you from the very "bottom of my heart.

" —— came here a few minutes after we came home. He " was very good and did not try any of his pranks on me. Please " don't tell anything to —— because I don't want the others to " say that I made up false stories about an innocent man. I am " sure, now you have room to think that I too encouraged him; " that is why I don't want you to speak to —— about this. I " am not boasting, but it is the actual fact. I have never had " anything to do with another person, and it has always been my " one idea to love only one. Take my word I am not a person " who is easily tempted. I have always aimed at having a pure " character and you can be sure that in rain or sunshine I will " stand by you till the end of my life. It was my ambition " to find a man too with a pure character and I have found it " in you. Therefore don't fear. I will always be faithful to " you, my darling. I hope you are going for a change. If you " are going to N'Eliya please be careful the way you drive the " car. Can't you get someone to accompany you, without going " alone? I think I had better stop writing as I am getting late " for the post. I will write to you again on Thursday.

" With much love and kisses.
" from
" Yours for ever.
" Girlie."

Certain initials irrelevant for the purposes of this appeal appear in the spaces left blank.

The next letter is:

" Boange Walauwa,
" Kadugannawa.
" 19.12.50

" My darling Teddy,

" I hope my letter has reached you safely. Please be careful " with my letters because there are silly people waiting to make " unnecessary fuss.

" Where did you all go yesterday? I heard that you were " going home last evening.

" A little while ago we returned after a days outing in " Kandy. I had a long jaw with Aunt about the girl whom " —— and sister went to see at Kurunegala. As for me I was " anxiously waiting to come back soon, so that I may keep to " my promise.

" Have you decided about your holiday? Darling, you must " go somewhere and have a good time. Again I am telling you,

" if you are going to N'Eliya please be careful the way you " drive your car.

" Though I am here my thoughts are with you my love. Day " and night, I think of nothing else but you my darling. The " house is still been built. My one work is telling Mummy how " unfair they are in delaying like this. She too agrees with me, " but I haven't got the courage to go and tell Daddy. He doesn' " understand our position and is ready to get upset for the least " thing. That is why I am telling you that I am placed in such " a difficult position where I have to please so many.

" Only I know what a lot of mental agony I have to undergo. " Inspite of everything I never show it because I don't wish " others to say that I can't get on in life.

" I am also very anxious to know about your arrangements " etc. therefore please write to me on Saturday. I can send " one of my brothers to the post on that day. So please don't " fail to let me know all about yourself. I am taking a great risk " in asking you to write to me, but I hope everything will be " O.K. Another thing, if you are going anywhere or not please " let me know your holiday address.

" I am sending you the Observer Crossword puzzle. If it is " possible please do it and send it to me.

" I have sat up till late today because I wanted to write to " you somehow, when no one is about the place. It's past one " o'clock and I am feeling sleepy too, so I think I had better " conclude. Now please don't disappoint me.

" With much love and kisses.

" From
" Yours for ever,
" Girlie."

The third letter, from appellant to respondent, is:

" Kegalle.
" December 21, 1950.

" My darling dearest Girlie,

" I received both your letters safe & sound. It was indeed " sweet of you to have written to me exactly as promised. As " you wanted to know my arrangements for the holidays—well " here they are. Tomorrow morning I will be going to Kandy " and Katugastota. As a matter of fact as the Post Mark will " show you, I am posting this letter from Kandy. I will try to " pick up Shelly and failing I will go up alone even to Nuwara

" Eliya. If I go up alone I will stay at the Grand Hotel, Nuwara " Eliya. Otherwise I cannot definitely tell you where I will " stay. I shall send you a Christmas Card from Nuwara Eliya " to reach you on the 25th Morning. Thank you Darling for the " anxiety you have expressed regarding my driving up. I shall " indeed try to be careful as possible. Somebody has given you " some wrong information, since I have not left Kegalle since " you left on the 16th instant.

" I am glad to hear that you have been getting out a bit. I " think Darling if you can manage it, you too, should take a " holiday somewhere, why not induce your Daddy to go somewhere for a few days. You have been working very hard and " I think you fully well deserve a good holiday.

" Girlie dear, I have been missing you very badly these days. " Indeed the evenings are very dull and boring without you and " I am waiting to go somewhere for a little rest. I am much " thankful to you for the kind thoughts you have been having " about me. Girlie I don't think I need repeat all what you " have written to me, because I feel just the same way as you " have expressed. I can assure you that all the expectations " and the dreams you have of your future will not be in vain, you " can confidently hope. The sooner it is, the better, I think. " So that you should, if you possibly can, have a chat with your " Daddy and tell him that this unnecessary delay is by no means " good to either. It has been hanging fire since June but I find " nothing appears to have been done. It is no use delaying now. " I can tell your Daddy about it, but I don't want to hurt your " feelings, it will be better if you could put it to him.

" —— is yet down with measles and it looks as if Sister and " them will not be going anywhere for the holidays.

" Darling I hope you are keeping good health. Please be " careful of yourself and don't fall ill like last time what happened. I suppose the mornings are bitterly cold there.

" Daya and I just returned from seeing ' The Prince and the " ' Pauper.' It was a nice picture with a fine story of how " Henry VIII's son Edward for a lark exchanged places with a " pauper's son and it became a serious matter and it was with " great difficulty that the Prince managed to convince the people " that he was the real Prince. I wonder whether you have seen " any picture since you left on the 16th. Yes, that day, I thought " you might still be there, when I came after the pictures and it " was with great sorrow that I learnt from Daya that you had " left. Darling my thoughts are always of you every day and I "am most anxiously waiting till the 7th of next month. So "please on no account must you keep away from coming on "the 7th.

"Don't worry I will not tell —— a word of what you have "told me, nor will I tell anyone a word of it. But Darling you "must be extremely careful of yourself and don't allow people "to treat you in the same manner that you were treated when "you were a small girl of 8 or 9 years. Show them a little "reserveness on your part and I am sure they will understand.

"As regards the Puzzle I don't think you are in a hurry. I "think the closing date is 16th January. I will have it made "and give it to you when you come on the 7th.

"Well, Girlie my sweetheart, what do you want from Nuwara "Eliya—don't tell me you want the lake, or the park. I always "think how wonderful it would have been if you could have "accompanied me on this holiday—just you and me with all the "cares and worries of this world forgotten for ten glorious days!

"L. B. and Nanda were here last Friday evening. They too "don't intend going anywhere. L. B. it seems is going to take a "course of medicine at Galagedera and I suppose Nanda too will "be there. Daya told me today that Nanda's little daughter is "also down with measles—that means they too will have to stick "at Yatiyantota.

"Well Darling I think I better stop, now it is nearly 11.30 "p.m. In the Christmas Card I shall give you my address in "Nuwara Eliya and the date of my last day of stay there. "Write to me then if you can.

"Cheerio my sweetheart.
"With love.
"Teddy."

Neither of the courts in Ceylon has been able to find in the correspondence above a promise to marry. Their Lordships are in the same position. The letters on the construction most favourable to the plaintiff do no more than assume that a marriage will take place as a result of an oral promise. Whether such promise was conditional or unconditional, and if the former, whether the condition was ever fulfilled, is not stated. Extrinsic evidence being inadmissible to supply the deficiencies in the correspondence, the action necessarily failed.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment and decree of the Supreme Court be set aside and the decree of the District Court restored. The respondent must pay the costs of this appeal and of the appeal to the Supreme Court.

Solicitors: *T. L. Wilson & Co.*

C. C.

J. C.*
1959
June 22.

SZE HAI TONG BANK LTD. . . . . APPELLANTS;

AND

RAMBLER CYCLE CO. LTD. . . . . RESPONDENTS.

[illegible]

ON APPEAL FROM THE COURT OF APPEAL OF THE COLONY OF SINGAPORE.

Contract—Exceptions clause—Conversion—Cargo released to consignee against indemnity without production of bill of lading—"Responsibility of . . . carrier . . . to cease absolutely after" discharge—Whether carrier liable.
Conversion.
Shipping—Bill of lading—Release of goods without production of—Exceptions clause—Responsibility of carrier to "cease absolutely" after discharge — Construction — Implied limitation — Subject to primary contractual obligation to deliver only against production of bill of lading.
Singapore—Shipping.

The respondent manufacturer shipped from England to Singapore bicycle parts to the value of about £3,000 under a bill of lading requiring the goods to be delivered "unto order or his or their "assigns," and which, by clause 2, provided that "(*c*) . . . the "responsibility of the carrier . . . shall be deemed . . . to cease "absolutely after the goods are discharged" from the ship.

After the goods had been discharged in Singapore the carrier's authorised agent, in accordance with what was alleged to be the common practice there, released them to the consignee against a written indemnity by the latter's bank in favour of the carrier, but without production of the bill of lading. The consignee never paid for the goods, and on a claim by the respondent against the carrier for damages for breach of contract or for conversion the latter brought in the consignee and the indemnifying bank as third parties, claiming to be entitled to be indemnified by them. The bank—the present appellant—admitted liability to indemnify the carrier if the latter were held liable:—

Held, that a shipowner who delivers without production of the bill of lading does so at his peril. In delivering the goods, without production of the bill of lading, to a person who, to its knowledge, was other than one entitled under the bill of lading to receive them, the carrier was liable for breach of contract and for conversion, and was not protected by the exception clause 2 (*c*). The extreme width of that clause must be cut down by an implied limitation; it must be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract, and at least so as not to permit the carrier deliberately to disregard its obligation as to delivery—to deliver against production of the bill of lading.

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* *Present*: LORD DENNING, LORD JENKINS, the RT. HON. L. M. D. DE SILVA.

Glynn v. *Margetson & Co.* [1893] A.C. 351 at 357; 9 T.L.R. 437; *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama* [1957] A.C. 149 at 164; [1957] 2 W.L.R. 45; [1956] 3 All E.R. 957; affirming [1956] 1 Q.B. 462 at 501; [1956] 2 W.L.R. 232; [1956] 1 All E.R. 209; *The Cap Palos* [1921] P. 458 at 471; 37 T.L.R. 921 applied.

Chartered Bank of India, Australia and China v. *British India Steam Navigation Co. Ltd.* [1909] A.C. 369; 25 T.L.R. 480 distinguished.

Judgment of the Court of Appeal of Singapore affirmed.

Appeal (No. 20 of 1958) from a judgment of the Court of Appeal of the Colony of Singapore (September 30, 1957) affirming a judgment of the High Court of Singapore (January 17, 1957).

The following facts are taken from the judgment of the Judicial Committee: The Rambler Cycle Company Limited manufactured bicycles in England and exported them to various parts of the world, and in particular to Singapore, where they had customers called the Southern Trading Company. In 1954 those customers ordered bicycle parts to the value of nearly £3,000 from the Rambler Cycle Company. Payment was to be 90 days, documents against payment. The Rambler Cycle Company made the goods and sent them off to Singapore. They shipped the goods on the S.S. *Glengarry*, which belonged to Glen Line Limited, and they paid the freight in advance. The steamship company issued a bill of lading dated July 30, 1954, in which they acknowledged that the goods were shipped by the Rambler Cycle Company and were to be conveyed by the *Glengarry* and were to be delivered at the port of Singapore "unto order or his "or their assigns." There was noted on the bill of lading a request by the Rambler Cycle Company saying: "Notify: "Southern Trading Company, C Short Street Singapore." The Rambler Cycle Company insured the goods through Lloyd's and obtained an insurance certificate. That covered the goods during the voyage and for 90 days thereafter. The Rambler Cycle Company also drew a bill of exchange on the Southern Trading

Company for the amount due. That was payable 90 days after acceptance. The Rambler Cycle Company also made out an invoice for the goods. The Rambler Cycle Company took all those documents to the Bank of China in London, who passed them on to their branch in Singapore. That branch was to hold them until the bill of exchange was paid and also any charges.

Clause 2 of the bill of lading provided: "(*c*) . . . the responsibility of the carrier, whether as carrier or as custodian or "bailee of the goods shall be deemed . . . to cease absolutely "after they are discharged" from the ship.

On September 1, 1954, the *Glengarry* arrived in Singapore. The shipowners had agents there called Boustead and Company, who acted for them in every way. On the authority of those agents, on September 2 and 3, 1954, the goods were discharged from the ship and placed in the go-downs of the Singapore Harbour Board. (That was done, no doubt, under clause 10 of the bill of lading "at the risk and expense of the owners of the "goods.") Those shipping agents also wrote to the Southern Trading Company to notify them of the arrival of the goods. The Southern Trading Company wished to get possession of the goods but did not want to pay for them at that time. So they went along to their own bank, the Sze Hai Tong Bank Limited, and got that bank to sign a form of indemnity in favour of the shipowners, agreeing that, if the goods were released to the Southern Trading Company, they would indemnify the shipping company against any loss thereby occasioned. The indemnity was signed both by the Southern Trading Company and the Sze Hai Tong Bank and dated September 3, 1954. When the shipping company's agents received that indemnity, they authorised the Harbour Board to deliver the goods to the Southern Trading Company. The shipping company's agents never saw the bill of lading. It was not produced to them. It was, of course, still in the hands of the Bank of China, who would not deliver it except against payment. Yet the shipping company's agents issued a delivery order for the goods in favour of the Southern Trading Company. On September 4 and 6, 1954, the goods were removed from the Harbour Board premises by the Southern Trading Company.

The Southern Trading Company never did pay for the goods. They did not pay the draft. The Rambler Cycle Company did not know the goods had been delivered to the Southern Trading Company. They assumed that the goods had remained in warehouse at Singapore. They arranged for the insurance to be extended beyond the 90 days for two further periods of 30 days each consecutively. Eventually, in January, 1955, they discovered what had happened and in August, 1955, they brought an action against the shipping company claiming damages for breach of contract or for conversion. The shipping company brought in the Southern Trading Company and the Sze Hai Tong Bank as third parties, claiming that they were entitled to be indemnified by them.

The action was tried by Whitton J. in the High Court of Singapore. He gave judgment for the cycle company against the shipping company for £3,005 11s. 6d., and also made a declaration that the shipping company were entitled to be indemnified by the third parties. The shipping company did not appeal but the Sze Hai Tong Bank did so. The Court of Appeal of Singapore (Knight Ag.C.J. of Singapore, Thomson C.J. of Malaya, and Chua J.) dismissed the appeal. The Sze Hai Tong Bank now appealed to Her Majesty in Council. The contest before the Board was solely whether judgment was properly entered against the shipping company: for if it was, the Sze Hai Tong Bank recognised that they were bound to indemnify the shipping company.

1959. May 6, 7, 8. *T. G. Roche Q.C.* and *G. R. F. Morris Q.C.* for the appellants. There are only two effective parties before the Board—the appellant bank and the respondents, the Rambler Cycle Company—and there is only one issue—the construction of the bill of lading. There is in Singapore a practice whereby the ship's agents will always release goods without production of the bill of lading providing they are protected by an indemnity, and in this case the appellant bank gave the indemnity. The main defence to the action was that the bill of lading by its express terms limited the liability of the Glen Line to the period from the time the goods were taken on board to the time of discharge from the ship, and reliance was placed on the decision of this Board in *Chartered Bank of India, Australia and China* v. *British India Steam Navigation Co. Ltd.*,[1] where, on a very similar clause, it was held that the shipowners were not responsible. It is submitted (1) that clause 2 is not an exceptions clause at all, and (2) that misdelivery is not a fundamental breach but a breach in the course of the execution of the contract. But the main question is on the construction of the bill of lading as to the effect of the contract. The Court of Appeal below distinguished the *Chartered Bank* case [1] on the ground that here the Glen Line through their agents had reassumed dominion over the goods. No such point was pleaded, or taken in the court below, or argued in either court, and is not supported by any evidence, and it is submitted that the point should not be open here.

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[1] [1909] A.C. 369; 25 T.L.R. 480.

The first contention is that the trial judge was right in saying that "conditions 2 and 10 protect the defendants from liability, "and to succeed I think the plaintiffs must show that these "conditions are not enforceable in the circumstances of this case, "and this involves the proposition that the *Chartered Bank* case [1] "is not applicable." The second question is whether the trial judge was right in saying that he was compelled by authority to disregard clause 2—which he held was an exceptions clause. Recent authorities will be referred to in support of the submission that the judge entirely misunderstood the position. Then there are the points whether the shipowners have been guilty of a fundamental breach, and whether clause 2 is an exceptions clause on which they can rely. They are really all points of construction.

With regard to the first point, the Court of Appeal distinguished the *Chartered Bank* case [1] on a ground which simply cannot hold water. Here the carriers are not liable as bailees. They are liable up to the time of discharge, but if the consignees do not collect the goods, then under the contract the carriers are not liable; there cannot be imposed on them some contract which they had never undertaken at all. In the *Chartered Bank* case [1] the Board said that the clause there was clear and unambiguous and should be applied. The ratio decidendi of that case was not any question of acting outside the scope of authority—they said that it was immaterial to decide that, and they clearly relied on the clause. In the present case the carriers have to avail themselves of the final words of clause 2 (*c*), "the responsibility of the carrier . . . shall be deemed . . . "to cease absolutely after [the goods] are discharged" from the ship.

The important paragraph of the statement of claim states that "notwithstanding the demands of the plaintiffs for the delivery "of the said goods in accordance with the provisions of the said "bill of lading the defendants have . . . failed to deliver the said "goods or any of them to the plaintiffs . . ." It is quite clear that the demands were subsequent to the misdelivery. There is no evidence of any demand while the goods were in the custody of the carriers. [Reference was made to *Smith* v. *Young*.[2]]

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[1] [1909] A.C. 369.

[2] (1808) 1 Camp. 439, 440.

Next, the trial judge was right in saying that clauses 2 and 10 on their ordinary construction effectively protected the carriers. Taking it first as a question of principle, it is impossible to say that a party cannot as it were contract out of a fundamental obligation; that all depends on what is fundamental, and that depends on the contract. In the absence of a statute the parties can make any contract they choose; what is a fundamental breach depends on what is the obligation: *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*[3] One must read the contract as a whole to find out what is a fundamental breach and look at the clause in question to see what it provides: *Gibaud* v. *Great Eastern Railway Co.*[4]; *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co. (No. 1)*[5]; *J. Spurling Ltd.* v. *Bradshaw*[6]; *Karsales (Harrow) Ltd.* v. *Wallis.*[7] Originally the carriers had a duty to take care of the goods which, it is assumed, ran on until delivered; that arose because they were carriers, custodians or bailees, and under the contract which makes them that it is said that their responsibility as such shall cease after discharge. Clause 2 is not an exceptions clause. The duty to take care is an important part of bailment, and this clause limits the time under which they are to be responsible, and all responsibility thereafter ceases. That is defining a period of time. The responsibility having ended, one cannot say that it revives because subsequently something which would have been a breach of contract occurred. [Reference was made to Carver's Carriage of Goods by Sea, 10th ed., p. 690, and to *Heugh* v. *London and North Western Railway Co.*[8]]

Here the contract absolves the carriers from the resulting liability as bailees after the carriage is done. They are excused from that liability which would otherwise arise by law. So, it is submitted, it is not an exception; and it is not a fundamental breach; there cannot be a fundamental breach unless there is a contractual duty, and there is not. Suppose this were, contrary to the above submission, an exceptions clause and a fundamental breach, the words of this contract are so clear that there is no room for cutting them down by implying a term that they do not apply: *Ashby* v. *Tolhurst.*[9] *Compania Importadora di Arroces*

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[3] [1908] A.C. 16; 24 T.L.R. 114.

[4] [1921] 2 K.B. 426, 435; 37 T.L.R. 422.

[5] [1953] 1 W.L.R. 1468, 1470; [1953] 2 All E.R. 1471.

[6] [1956] 1 W.L.R. 461, 464; [1956] 2 All E.R. 121.

[7] [1956] 1 W.L.R. 936, 940; [1956] 2 All E.R. 866.

[8] (1870) L.R. 5 Ex. 51.

[9] [1937] 2 K.B. 242; 53 T.L.R. 770; [1937] 2 All E.R. 837.

Collette y Kamp S.A. v. *P. & O. Steam Navigation Co.*,[10] where the shipowner was held liable for misdelivery at the ship's side, is an entirely different case, because conversion occurred when the shipowner was undoubtedly a bailee. There is complete freedom to make whatever contract one likes after discharge, and the carriers did so; clause 2 (*c*) is so clear that there is no further room for controversy. Not delivering against a bill of lading is not an absolute obligation. No distinction can be drawn between the present and the *Chartered Bank* case.[11]

To extend the duration of the contract one must vary it, and to do that one must create a new contract, and to do so there must be parties. There is no breath of that in the pleadings and the point was not taken in the first court and should not be open now: *North Staffordshire Railway Co.* v. *Edge*[12]; *The Tasmania.*[13] The question of repudiation, which was dealt with by the trial judge, is really immaterial in this case. [*Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.*[14] was referred to.]

On the true construction of the contract, and in particular of clause 2 (*c*), and on the facts, Glen Line were not liable to the respondents.

Sir David Cairns Q.C. and *Michael Kerr* for the respondents. The respondents put the case on the basis that the act of the appellants and of the shipowners in delivering the goods to the Southern Trading Company was a fundamental breach of this contract and a conversion. That involves seeing what this contract fundamentally was. The bill of lading is a contract to carry the goods to Singapore and to deliver them to order, and the contract continues in force up to the time of delivery to order. It is true that under certain exceptions clauses the responsibilities of the carriers may be varied in certain ways, but the contract is not one which comes to an end until delivery to order has taken place, unless, of course, there is some frustrating event or repudiation and acceptance of repudiation which brings it to an end at an earlier date. In the absence of anything of that kind it is a contract which continues up to the time of delivery to order, and one of the fundamental obligations under the contract is to deliver to order. If that is so, then it is clearly established that the delivery to a person other than the person to whom delivery is authorised by the shipper is a breach of contract and a conversion: *Glyn Mills Currie & Co.* v. *East and West India Dock Co.*[15] states the general principle. See also on this *The Stettin*[16]; *Bristol and West of England Bank* v. *Midland Railway Co.*[17]; *Hannam* v. *Arp*[18] and *Skibsaktieselskapet Thor Thoresens Linje* v. *H. Tyrer & Co. Ltd.*[19]

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[10] (1927) 28 Ll.L.Rep. 63.

[11] [1909] A.C. 369.

[12] [1920] A.C. 254, 268; 36 T.L.R. 115.

[13] (1890) 15 App.Cas. 223, 225.

[14] [1926] A.C. 497, 509; 42 T.L.R. 359.

Admittedly this is finally a question of construction. From the authorities the law has been developed along two apparently rather different lines, one on the basis of construction and one on the basis of an overriding rule of law that an exceptions clause is not to be construed in such a way as to provide protection against a fundamental breach of the contract. It is conceded that if an exceptions clause is sufficiently clear and precise in its terms it can be protection against even a fundamental breach: *The Cap Palos.*[20] Under the construction submitted for the appellants the goods could be delivered to a stranger. The first submission in relation to the construction is that before an exceptions clause can be given that sort of effect it has to be in language which admits of no other interpretation. A clause of this kind is to be given not the widest interpretation but a narrow one having regard to the fundamental purpose of the contract: *London and North Western Railway Co.* v. *Neilson.*[21] *Woolmer* v. *Delmer Price Ltd.*,[22] cited with approval in *J. Spurling Ltd.* v. *Bradshaw*,[23] is a strong case, in which McNair J. said that the onus is on the defendants to bring themselves within the clause and to show affirmatively that the loss of the goods was not due to some fundamental breach of contract. It is a much easier position here, because it is established on the evidence that there was a fundamental breach of the contract. In *Alexander* v. *Railway Executive*[24] Devlin J. referred to the bailee's duty of care. It may be that in the circumstances of this case, because of clause 2 (*c*), the position is different in relation to the duty of care. It may be that under clause 2 (*c*) the ordinary duty which would rest on the carrier would be excepted. But it still remains that so far as delivery of the goods to the right person, or refraining from delivery to the wrong person, is concerned, that is something which remains fundamental to this contract.

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[15] (1882) 7 App.Cas. 591, 610.

[16] (1889) 14 P.D. 142, 147; 5 T.L.R. 581.

[17] [1891] 2 Q.B. 653, 662; 7 T.L.R. 627.

[18] (1928) 30 Ll.L.Rep. 306, 308.

[19] (1929) 35 Ll.L.Rep. 163, 170.

[20] [1921] P. 458, 470; 37 T.L.R. 921.

[21] [1922] 2 A.C. 263, 271, 275; 38 T.L.R. 653.

[22] [1955] 1 Q.B. 291, 294; [1955] 2 W.L.R. 329; [1955] 1 All E.R. 377.

[23] [1956] 1 W.L.R. 461.

[24] [1951] 2 K.B. 882, 887; [1951] 2 T.L.R. 69; [1951] 2 All E.R. 442.

On the evidence here the agents acted as agents of the Glen Line. It must therefore be taken that the delivery of the goods to the Southern Trading Company was the act of the Glen Line themselves. The first distinction between this case and the *Chartered Bank* case [25] is that in the latter the act which deprived the true owners of the possession of the goods was the act of the landing agents done in fraud of the true owners and in fraud of their own principals. It would seem that there is no case which shows that the fraudulent act of the agent, even if it be shown to be committed in the course of his employment, is for all purposes the act of the principal: see *Lloyd* v. *Grace, Smith & Co.*[26] A further ground on which it can be said that the agent's act in the *Chartered Bank* case [27] was not the act of the principal was that it could not be said that it was an act in the course of the employment. On those grounds the *Chartered Bank* case [27] is quite clearly distinguishable from the facts of this case, and it cannot be of very much assistance here. It would be an overstraining of the doctrine of stare decisis to apply it here in the circumstances. If that case cannot be distinguished it would, it is submitted, be decided differently today. So far as the *Compania Importadora* case [28] is concerned, it was there said: "It seems that such a clause has never been extended to a "simple case of misdelivery." This present case is a simple one of misdelivery. This clause must be read in such a way that it is not to be deemed to be a protection against the fundamental obligation under the contract—to deliver against the bill of lading. And, further, in giving the delivery order in the circumstances the carriers are guilty of a conversion which is quite independent of their duties under the contract of carriage. It is simply a tortious act. A clause of this kind will not be held to cover negligence unless negligence is specifically mentioned. It was said in *Ashby* v. *Tolhurst* [29] that "the county court judge found "that he could imply in this contract a term to the effect that "the car should not be handed over without production of the "ticket. I myself think that it was not legitimate to imply any "such term." In the present case there is such a term, not an implied term but an express term, that the goods are to be delivered to order. Somewhat similar considerations apply to

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[25] [1909] A.C. 369.

[26] [1912] A.C. 716, 724, 726; 28 T.L.R. 547.

[27] [1909] A.C. 369.

[28] 28 Ll.L.Rep. 63, 69.

[29] [1937] 2 K.B. 242, 253.

Heugh v. *London and North Western Railway Co.*[30] The present case is not one in which the shipowners were in the position of involuntary bailees.

With regard to the contention for the appellants that clause 2 (*c*) is not an exceptions clause, the only way in which one can test whether or not a clause is an exceptions clause is to look at the remainder of the contract to see what the obligation would be thereunder and then see whether this particular clause limits the obligation in some way. Clause 2 (*a*) and (*b*) are definitely exceptions clauses, and it would be extraordinary if (*c*) were not. On the tests laid down in any of the recent cases this is a fundamental breach: *Smeaton Hanscomb's* case,[31] *Spurling's* case[32] and the *Karsales* case.[33]

Roche Q.C. in reply. Five cases were cited for the respondents for the proposition that a shipowner who delivers to the wrong person is guilty of a breach of contract. But the whole point is that there is a clause 2 (*c*); all liability ceases on discharge; and that clause protected the shipowner. The *Chartered Bank* case[34] is a decision that the responsibility in conversion was one which ceased because the parties agreed that it should cease; and that is just the position here. The respondents must ask the Board to overrule the *Chartered Bank* case,[34] which has stood for half a century, and it is no mean thing to ask that when it has been the basis of hundreds of thousands of bills of lading. That case is indistinguishable.

The cases cited for the respondents on the fundamental breach point were all cases where there was a general duty to take care, and the action was brought for breach of that. There cannot be a fundamental breach of contract unless a breach of contract is first established; there cannot be a breach of contract unless there is a duty. Here all responsibility ceases as from a given event. At the time the fundamental breach is alleged, the carriers' duties under the contract had ceased—the contract was still there, but the responsibility under it had ceased. The whole bill of lading is made subject to the condition. The operative word here is "cease."

June 22. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: The shipping company's agents were quite frank about what they did. Their representative said in evidence: "In issuing delivery "orders and in everything we do we act as agents for the Glen "Line. It is an accepted fact that, in absence of bills of lading, "goods are released on an indemnity. I agree we are supposed "to deliver on the bill of lading being produced to us. I agree "that, when we do not have the bill of lading produced, we "cover ourselves by getting an indemnity. When it is suggested to me that we get these indemnities because we know "we are doing what we should not do, I say that if no risk, we "would not need indemnity. I agree we get indemnity because "we are doing something we know we should not do, but it is "common practice. It is an everyday occurrence. We rely on "the bank's guarantee."

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[30] L.R. 5 Ex. 51.
[31] [1953] 1 W.L.R. 1468, 1471.
[32] [1956] 1 W.L.R. 461.
[33] [1956] 1 W.L.R. 936, 940.
[34] [1909] A.C. 369.

It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. In this case it was "unto order "or his or their assigns," that is to say, to the order of the Rambler Cycle Company, if they had not assigned the bill of lading, or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected.

In order to escape the consequences of the misdelivery, the appellants say that the shipping company is protected by clause 2 of the bill of lading, which says that: "During the period before "the goods are loaded on or after they are discharged from the "ship on which they are carried by sea, the following terms and "conditions shall apply to the exclusion of any other provisions "in this bill of lading that may be inconsistent therewith, viz., "(*a*) so long as the goods remain in the actual custody of the "carrier or his servants" (here follows a specified exception); "(*b*) whilst the goods are being transported to or from the ship" (here follows another specified exemption); "(*c*) in all other cases "the responsibility of the carrier, whether as carrier or as "custodian or bailee of the goods, shall be deemed to commence "only when the goods are loaded on the ship and to cease "absolutely after they are discharged therefrom."

The exemption, on the face of it, could hardly be more comprehensive, and it is contended that it is wide enough to absolve the shipping company from responsibility for the act of which the Rambler Cycle Company complains, that is to say, the delivery of the goods to a person who, to their knowledge, was not entitled to receive them. If the exemption clause upon its true construction absolved the shipping company from an act such as that, it seems that by parity of reasoning they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them into the sea. If it had been suggested to the parties that the condition exempted the shipping company in such a case, they would both have said: "Of course not." There is, therefore, an implied limitation on the clause, which cuts down the extreme width of it: and, as a matter of construction, their Lordships decline to attribute to it the unreasonable effect contended for.

But their Lordships go further. If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract, as it seems to their Lordships, has, as one of its main objects, the proper delivery of the goods by the shipping company, "unto "order or his or their assigns," against production of the bill of lading. It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences. The clause must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract: see *Glynn* v. *Margetson & Co.*[1]; *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama.*[2]

To what extent is it necessary to limit or modify the clause? It must at least be modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery. For that is what has happened here. The shipping company's agents in Singapore acknowledged: "We are doing something we "know we should not do." Yet they did it. And they did it as agents in such circumstances that their acts were the acts of the shipping company itself. They were so placed that their state of mind can properly be regarded as the state of mind of the shipping company itself. And they deliberately disregarded one of the prime obligations of the contract. No court can allow so fundamental a breach to pass unnoticed under the cloak of a general exemption clause: see *The Cap Palos.*[3]

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[1] [1893] A.C. 351, 357; 9 T.L.R. 437.

[2] [1956] 1 Q.B. 462, 501; [1956] 2 W.L.R. 232; [1956] 1 All E.R. 209; [1957] A.C. 149, 164; [1957] 2 W.L.R. 45; [1956] 3 All E.R. 957.

The appellants placed much reliance, however, on a case which came before their Lordships' Board in 1909, *Chartered Bank of India, Australia and China* v. *British India Steam Navigation Co. Ltd.*[4] There was there a clause which said that "in all cases and under all circumstances the liability of the "company shall absolutely cease when the goods are free of the "ship's tackle." The goods were discharged at Penang and placed in a shed on the jetty. Whilst there a servant of the landing agents fraudulently misappropriated them in collusion with the consignees. Their Lordships' Board held that the shipping company were protected by the clause from any liability.

Their Lordships are of opinion that that case is readily distinguishable from the present, as the courts below distinguished it, on the simple ground that the action of the fraudulent servant there could in no wise be imputed to the shipping company. His act was not its act. His state of mind was not its state of mind. It is true that, in the absence of an exemption clause, the shipping company might have been held liable for his fraud, see *United Africa Co. Ltd.* v. *Saka Owoade.*[5] But that would have been solely a vicarious liability. Whereas in the present case the action of the shipping agents at Singapore can properly be treated as the action of the shipping company itself.

The self-same distinction runs through all the cases where a fundamental breach has disentitled a party from relying on an exemption clause. In each of them there will be found a breach which evinces a deliberate disregard of his bounden obligations. Thus, in *Bontex Knitting Works Ltd.* v. *St. John's Garage*,[6] the lorry driver left the lorry unattended for an hour, in breach of an express agreement for immediate delivery. In *Alexander* v. *Railway Executive*[7] the cloak-room official allowed an unauthorised person to have access to the goods, in breach of the regulations in that behalf. In *Karsales (Harrow) Ltd.* v. *Wallis*[8] the agent of the finance company delivered a car which would not go at all, in breach of its obligation to deliver one that would go. In each of those cases it could reasonably be inferred that the servant or agent deliberately disregarded one of the prime

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[3] [1921] P. 458, 471; 37 T.L.R. 921.

[4] [1909] A.C. 369; 25 T.L.R. 480.

[5] [1955] A.C. 130; [1955] 2 W.L.R. 13; [1957] 3 All E.R. 216.

[6] (1943) 60 T.L.R. 44, 253.

[7] [1951] 2 K.B. 882; [1951] 2 T.L.R. 69; [1951] 2 All E.R. 442.

[8] [1956] 1 W.L.R. 936; [1956] 2 All E.R. 866.

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obligations of the contract. He was entrusted by the principal with the performance of the contract on his behalf: and his action could properly be treated as the action of his principal. In each case it was held that the principal could not take advantage of the exemption clause. It might have been different if the servant or agent had been merely negligent or inadvertent: see *Smackman* v. *General Steam Navigation Co.*[9]; *Ashby* v. *Tolhurst*,[10] by Sir Wilfrid Greene M.R., and *Swan, Hunter and Wigham Richardson Ltd.* v. *France Fenwick Tyne and Wear Co. Ltd.*[11]

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs.

Solicitors: *Lawrance, Messer & Co.; Ingledew, Brown, Bennison & Garrett.*

C. C.

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[9] (1908) 13 Com.Cas. 196.

[10] [1937] 2 K.B. 242, 253; 53 T.L.R. 770; [1937] 2 All E.R. 837.

[11] [1953] 1 W.L.R. 1026, 1030–1032; [1953] 2 All E.R. 679.

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MAXINE FOOTWEAR CO. LTD. and Another . Appellants;

and

CANADIAN GOVERNMENT MERCHANT MARINE LTD. . . . . . . Respondents.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Shipping—Bill of lading—Seaworthiness—Hague Rules—Doctrine of stages—Fire—Loss of cargo—Overriding obligation to exercise due diligence "before and at the beginning of the voyage" to make ship seaworthy—Continuous obligation from at least the beginning of loading until start of voyage—Failure to exercise due diligence—Exemptions excluded—Doctrine of "stages"—Canadian Water Carriage of Goods Act, 1936—*Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., arts. III, r.* 1, *IV, r.* 2 (*b*).

Canada—Shipping.

Article III, rule 1, of the Hague Rules (scheduled to the Canadian Water Carriage of Goods Act, 1936), which provides that

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* *Present*: Viscount Kilmuir L.C., Lord Reid, Lord Tucker, Lord Somervell of Harrow and Lord Denning.

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"The carrier shall be bound, before and at the beginning of the "voyage, to exercise due diligence to, (*a*) make the ship seaworthy," is an overriding obligation, and if it is not fulfilled and in consequence damage results, the immunities of article IV—which, by rule 2, provides that "Neither the carrier nor the ship shall be "responsible for loss or damage arising or resulting from . . . "(*b*) fire, unless caused by the actual fault or privity of the "carrier"—cannot be relied on. The words "before and at the "beginning of the voyage" in article III, rule 1, mean the period from at least the beginning of the loading until the vessel starts on her voyage, and the carrier's obligation to exercise due diligence to make the ship seaworthy continues over the whole of that period.

The respondents' ship, while in port and after loading had begun, caught fire owing to the negligence of their servants in thawing out frozen scupper pipes with an acetylene torch and she had to be scuttled. The appellants' goods, which had been loaded under a bill of lading incorporating the Canadian Water Carriage of Goods Act, 1936, to which were scheduled the Hague Rules, were lost. On a claim for damages:—

Held, that the negligence which caused the fire was a failure by the respondents to exercise due diligence within article III, rule 1, during the relevant period—from the beginning of loading until the ship sank—as the result of which the ship became unseaworthy, and that unseaworthiness caused the loss of the appellants' goods, for which they were entitled to recover damages.

Paterson Steamships Ltd. v. *Robin Hood Mills Ltd.* (1937) 58 Ll.L.Rep. 33 applied.

Observations on the doctrine of "stages."

Dictum of Lord Macmillan in *Stag Line Ltd.* v. *Foscolo, Mango & Co. Ltd.* [1932] A.C. 328 at 350; 48 T.L.R. 127 considered.

Judgment of the Supreme Court of Canada [1957] S.C.R. 801 reversed.

APPEAL (No. 13 of 1958) from a judgment of the Supreme Court of Canada (Kerwin C.J., Taschereau, Fauteux and Abbott JJ., Cartwright J. dissenting) (October 1, 1957) affirming a judgment of the Exchequer Court of Canada (Cameron J.) (February 14, 1956) which in turn had affirmed a judgment of the Admiralty Court for the District of Quebec (Smith J.) (June 3, 1952) whereby the present appellants' action as shippers against the respondents as carriers for non-delivery of their goods was dismissed.

The following facts are taken from the judgment of the Judicial Committee: The first named appellants were shippers and the second named appellants consignees of cargo loaded on board the *M.V. Maurienne* (hereinafter called the ship) at Halifax, N.S., in February, 1942, to be carried to Kingston, Jamaica. The cargo and ship were destroyed by fire before she left Halifax.

The second named appellants had assigned their rights to the first named appellants.

The registered owner of the ship was His Late Majesty King George VI represented by the Honourable the Minister of Transport of the Dominion of Canada. The respondents originally submitted that the contract of carriage on which the appellants relied was with the Crown and not with the respondents. That point failed in all courts below and was not taken before the Board.

The contract of carriage was subject to the Canadian Water Carriage of Goods Act, 1936. The following provisions of the Hague Rules, which were scheduled to that Act, were material.

"Article III.

"RESPONSIBILITIES AND LIABILITIES.

"1. The carrier shall be bound, before and at the beginning "of the voyage, to exercise due diligence to,

"(*a*) make the ship seaworthy;

"(*b*) properly man, equip, and supply the ship;

"(*c*) make the holds, refrigerating and cool chambers, and "all other parts of the ship in which goods are carried, fit and "safe for their reception, carriage and preservation.

"2. Subject to the provisions of Article IV, the carrier shall "properly and carefully load, handle, stow, carry, keep, care "for and discharge the goods carried.

"Article IV.

"RIGHTS AND IMMUNITIES.

"1. Neither the carrier nor the ship shall be liable for loss "or damage arising or resulting from unseaworthiness unless "caused by want of due diligence on the part of the carrier to "make the ship seaworthy, and to secure that the ship is properly "manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship "in which goods are carried fit and safe for their reception, "carriage and preservation in accordance with the provisions of "paragraph 1 of Article III.

"Whenever loss or damage has resulted from unseaworthiness, "the burden of proving the exercise of due diligence shall be "on the carrier or other person claiming exemption under this "section.

"2. Neither the carrier nor the ship shall be responsible for "loss or damage arising or resulting from,

"(*a*) act, neglect, or default of the master, mariner, pilot or "the servants of the carrier in the navigation or in the management of the ship;

"(*b*) fire, unless caused by the actual fault or privity of the "carrier;

"(*c*) perils, danger, and accidents of the sea or other navigable "waters;

"(*d*) act of God;

"(*e*) act of war;

"(*f*) act of public enemies;

"(*g*) arrest or restraint of princes, rulers or people, or seizure "under legal process;

"(*h*) quarantine restrictions;

"(*i*) act or omission of the shipper or owner of the goods, "his agent or representative;

"(*j*) strikes or lock-outs or stoppage or restraint of labour "from whatever cause, whether partial or general;

"(*k*) riots and civil commotions;

"(*l*) saving or attempting to save life or property at sea;

"(*m*) wastage in bulk or weight or any other loss or damage "arising from inherent defect, quality or vice of the goods;

"(*n*) insufficiency of packing;

"(*o*) insufficiency or inadequacy of marks;

"(*p*) latent defects not discoverable by due diligence;

"(*q*) any other cause arising without the actual fault or "privity of the carrier, or without the fault or neglect of the "agents or servants of the carrier, but the burden of proof shall "be on the person claiming the benefit of this exception to show "that neither the actual fault or privity of the carrier nor the "fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

"3. The shipper shall not be responsible for loss or damage "sustained by the carrier or the ship arising or resulting from "any cause without the act, fault or neglect of the shipper, his "agents or his servants."

The cargo consisted of three wooden crates and one drum of shoe-leather and shoe findings. It was delivered to Canadian National Railways in Montreal on or about January 26, 1942. Canadian National Railways issued a through bill of lading which contained a clause paramount stating that the bill of lading had effect subject to the provision of the Water Carriage of Goods

Act. The bill of lading being subject to the Act, such a clause had to be inserted under section 4 of the Act.

The ship arrived at Halifax on Saturday, January 31. It had been common ground that the appellants' cargo was loaded in No. 3 hold. The loading of that hold probably began on Tuesday, February 3, and finished on Friday, 6th. The loading of all cargo was completed at about 8.15 on Friday evening. The intention was to sail on Saturday.

On the morning of Friday it was found that three scupper pipes passing through No. 3 hold and discharging from the bath, toilet and galley sink were blocked by ice at the point at which they met the ship's side. The master instructed one of the officers to have those pipes thawed out. That work was done between 3 and 4 p.m. on Friday afternoon by an employee of a Halifax firm, Purdy Bros., who used an acetylene torch.

There was cork insulation round the pipes. The heat of the acetylene torch acting on the cork started a fire. That was detected at about 11.30 p.m. In spite of efforts to extinguish the fire, it spread and at about 5.30 a.m. on Saturday, February 7, the master was forced to order the scuttling of the ship, which resulted in the loss, inter alia, of the appellants' cargo.

1959. May 26, 27, 28. *C. Russell McKenzie Q.C.* (Canadian Bar) and *S. O. Olson* for the appellants. The main questions are: (1) Whether the *Maurienne* was at any material time seaworthy. (2) Whether the respondents have discharged the onus of proving the exercise of due diligence at the material time to make the ship seaworthy and her holds fit for the reception, carriage and preservation of goods. (3) Whether the respondents are entitled to the benefit of the exceptions in article IV of the Hague Rules, scheduled to the Water Carriage of Goods Act, 1936, of Canada, which the bill of lading incorporated, so as to exempt them from liability for the loss of the appellants' goods. It is conceded that the contract of carriage was with the respondents, and the parties apparently agree that so far as fitness to receive the cargo is concerned, i.e., "cargoworthiness," the warranty is that the vessel is fit and safe for the reception, preservation and carriage of the goods, and this warranty operates at or with respect to the moment of time when cargo is commenced to be loaded. The duty cast upon the carrier under the provisions of article III, rule 1, of the Hague Rules is to make the vessel seaworthy and to make the holds cargoworthy. The onus is on the respondents to prove that they exercised diligence and did the best they could

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to make the ship seaworthy. On the evidence nothing was done in the circumstances which could be said to be the use of diligence, and the respondents have no answer to the appellants' case. The fundamental obligation is the care of the cargo. All rights and all immunities must be found in the statute itself; if the respondents did not comply with its requirements they cannot grasp this exception of no liability. All the way through they must make the ship seaworthy so far as due diligence will make it so. *Mississippi Shipping Co.* v. *S.S. Del Sud* [1] states what the American courts declare to be the law in relation to due diligence up to the moment.

The fundamental obligation in the contract was to deliver the appellants' cargo in accordance with the terms of the contract. Once it is established that the respondents failed to deliver, it is for them to show good cause for such failure and why they were excused under the terms of the statute. They are in possession of the facts and must prove them. They must prove that at the time of the reception of the goods—when they were loading them—the ship was in right and proper order to receive them. The respondents, in their printed case, say that "The duty cast "upon the carrier under the provisions of article III, rule 1, is "to make the vessel seaworthy and to make the holds cargo-"worthy. It is not to maintain the vessel in a state of seaworthi-"ness or the holds in a state of cargoworthiness. It follows "that a negligent act or omission which makes a vessel "unseaworthy or uncargoworthy is not per se a breach of the "duty. Such an act brings the duty into operation and the "carrier thereupon becomes under an obligation to exercise due "diligence to restore the vessel to seaworthiness or cargoworthi-"ness. Such an obligation does not cast upon the carrier the "duty of taking any action until he knows or ought to have "known of the defect." Here there was a situation where the respondents ought to have known that the ship was on fire, and they should have taken some action to protect the appellants' cargo. If the appellants are right on the first point, and this cargo was loaded at a time when the ship was unseaworthy—and at the specific time, between 3 and 4 p.m. on February 6, the ship had unquestionably become unseaworthy through fire—and the respondents have not proved an exception from liability, the appellants are entitled to succeed.

With regard to the authorities, it was said in *Paterson*

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[1] [1959] A.M.C. 653, 662.

Steamships Ltd. v. *Canadian Co-operative Wheat Producers Ltd.*[2]: " His [the carrier's] overriding obligation might be analysed into " a special duty to exercise due care and skill in relation to the " carriage of the goods and a special duty to furnish a ship that " was fit for the adventure at its inception. Those have been " described as fundamental undertakings, or implied obligations." See, also, *Gosse Millerd* v. *Canadian Government Merchant Marine Ltd.*[3] and *Colonial Steamships Ltd.* v. *The Kurth Malting Co.*,[4] the latter of which gives the latest declaration on this matter of the Supreme Court of Canada. The most recent case before the British Columbia Admiralty District Judge is *Easwest Produce Co.* v. *The Ship S.S. Nordnes.*[5] The principles of law on the point are so similar in their international application that some help may be obtained by citing an American case: *Ionian Steamship Company of Athens* v. *United Distillers of America* (*The Ionian Pioneer*),[6] in which it was said: " where the " standard of due diligence is applicable, it comprehends inspec- " tion and investigation, where prudent, to determine the " existence of deficiencies before they become critical, and the " failure to discover defects which examination would necessarily " have disclosed is the very absence of due diligence." It is for the carrier to bring himself within an exception: *F. C. Bradley & Sons Ltd.* v. *Federal Steam Navigation Co. Ltd.*[7]; the principle is applicable to the Canadian Water Carriage of Goods Act as to the Imperial Act. [Reference was also made to Scrutton on Charterparties, 16th ed., pp. 103, 306, 483, and to Carver's Carriage of Goods by Sea, 10th ed., p. 78, where it is stated: " If unfitness " of the ship becomes a real cause of loss of or damage to the " cargo, the shipowner is responsible, although other causes from " whose effect he is excused either at common law or by express " contract have contributed to cause the loss."] That particular passage appears in *Smith, Hogg & Co. Ltd.* v. *Black Sea and Baltic General Insurance Co. Ltd.*[8]

In summary, the ship was at all material times unseaworthy and her holds unfit and unsafe for the reception, carriage and preservation of the goods. The respondents failed, " before and at " the beginning of the voyage, to exercise due diligence to make " the ship seaworthy," and are, therefore, not entitled to the benefit of the exceptions in article IV, rule 2, of the Hague Rules. The loss of the appellants' goods was due to the negligence of the respondents' servants. The negligent acts were not acts done in the management of the ship. The respondents failed to establish their plea that the fire was not caused by their actual fault or privity. The direct cause of the loss of the goods was the act of the respondents' servants in bringing the goods to and loading them on a burning and unseaworthy ship the holds of which were not fit for their reception, carriage and preservation.

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[2] [1934] A.C. 538, 544; 51 T.L.R. 5.

[3] [1927] 2 K.B. 432, 434, 437; 43 T.L.R. 544.

[4] [1954] S.C.R.(Can.) 275, 277.

[5] [1956] Exch.Ct.(Can.) 328, 329.

[6] [1956] 2 A.M.C. 1750, 1758.

[7] (1927) 27 Ll.L.Rep. 395.

[8] [1940] A.C. 997, 1005; 56 T.L.R. 893; [1940] 3 All E.R. 405.

Leon Lalande Q.C. (Canadian Bar) and *John F. Donaldson* for the respondents. The respondents' submissions are summarised in the following propositions: (1) The presence of ice in the scuppers did not make the vessel unseaworthy or unfit to receive the cargo. That is to be taken as established now. (2) The use made of an acetylene torch to thaw out the ice in the scuppers was the cause—the physical cause—of the fire; that appears to be accepted. (3) The fire was not caused by the actual fault or privity of the carrier. (4) The unblocking of the scuppers was an act in the management of the ship: *The Glenochil* [9] and *The Rodney* [10] establish that, and those cases have been accepted by the Supreme Court of Canada in *Kalamazoo Paper Co.* v. *Canadian Pacific Railway Co.*[11] (5) This was an act of management of the ship in relation to the cargo then on board. The voyage commenced at the time this cargo was loaded, and at that time there was an obligation on the carrier to exercise due diligence to make the ship seaworthy.

The onus rests on the appellants to show that the loss of their goods was caused by the condition brought about by a failure by the respondents to exercise due diligence to make the ship seaworthy. The appellants have not proved that the vessel was unseaworthy at any material time and that their goods were lost thereby. The respondents performed their obligations under article III, rule 1, of the Hague Rules, and they are exonerated from liability by the provisions of article IV, rules 1, 2 (*a*) and (*b*), of those rules. If the appellants have made out a case of unseaworthiness, and it is established that the damage was caused by that unseaworthiness, then the respondents have to seek to escape that by establishing that they have exercised due diligence. It is submitted, therefore, that the appellants have the onus of establishing in this case that their cargo was loaded after 3 p.m. on

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[9] [1896] P. 10.

[10] [1900] P. 112.

[11] [1950] S.C.R.(Can.) 356.

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Friday. They have not met that onus and have therefore failed in an essential part of their case; on the contrary, the evidence is that the appellants' goods were loaded before 3 p.m. on Friday. On the question of onus, see *The Europa*,[12] which was approved by the House of Lords in *J. & E. Kish* v. *Charles Taylor, Sons & Co.*[13] [Reference was also made to *Minister of Food* v. *Reardon Smith Line Ltd.*[14]]

Donaldson following. My argument is based on nine propositions: (1) The primary obligation of the respondents was to deliver the appellants' goods at Kingston in like good order and condition as when shipped. This they failed to do, and they are thus prima facie liable to the appellants in damages. (2) This prima facie liability is subject to the effect of the exceptions clauses contained in the bill of lading; in so far as it is material those exceptions are those contained in article IV of the Schedule to the Act. The burden of proving loss by an excepted peril lies on the respondents. (3) The respondents have discharged this burden in two ways: (i) by showing that the loss was by fire not being a fire caused by their actual fault or privity: article IV, rule 2 (*b*); and (ii) also by showing that the loss was caused by some act, neglect or default in the management of the ship: article IV, rule 2 (*a*). As to "actual fault or privity," see *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.*,[15] which was approved in *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*,[16] the latter being a neat illustration of the difference between due diligence and actual fault or privity. On the basis of the above decisions it is submitted that so far as a prima facie case is concerned, the respondents have met it completely by showing that the loss was by fire, and it was by fire not caused by their actual fault or privity. The other way is to rely on article IV, rule 2 (*a*), which protects the respondents in respect of acts in the management of the vessel. The classical definition of "management" is contained in *Gosse Millerd Ltd.* v. *Canadian Government Merchant Marine Ltd.*[17]: there is no difficulty in the present case in applying that test; the scuppers are wholly unconcerned with the cargo.

The fourth proposition is: the respondents having established a defence to the appellants' prima facie claim, the appellants, to

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[12] [1908] P. 84; 24 T.L.R. 151.

[13] [1912] A.C. 604; 28 T.L.R. 425.

[14] [1951] 2 Lloyd's Rep. 265; [1951] 2 T.L.R. 1158.

[15] [1915] A.C. 705, 713; 31 T.L.R. 294.

[16] (1937) 58 Ll.L.Rep. 33, 39.

[17] [1929] A.C. 223, 233; 45 T.L.R. 63.

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succeed, must prove some other breach of the contract of carriage to which article IV provides no defence. The authority for that is *Minister of Food* v. *Reardon Smith Line Ltd.*[18] In *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[19] there is a passage which appears to show that the onus is not on the shipowner to prove positively that he has got a seaworthy ship. There are two essential elements to any claim based on unseaworthiness: (i) unfitness of the vessel; and (ii) the time at which that unfitness occurred. If one merely shows unfitness of the vessel without proving time, one is not alleging or proving any unseaworthiness as it is known to maritime law. Time is of the essence. Proposition (5): the appellants seek to establish proposition (4) (supra) by alleging that the loss of their goods resulted from unseaworthiness; but to this the respondents reply: (a) unseaworthiness does not give rise to a cause of action unless it consists of unfitness at the material time in respect of the material processes and damage to the cargo is caused thereby. The material times and processes are as follows: when the vessel is loading in port she must at the beginning of the operation of loading be fit to receive and hold the cargo in the conditions existing at the place of loading; (b) when the loading is completed and the ship is about to proceed on her voyage a new stage begins. This new stage involves the fitness of the ship with the cargo on board to proceed on her voyage. *McFadden* v. *Blue Star Line*[20] is the earliest of the cases which state the basic principles; see also on "stages" *C. Wilh Svenssons Travaruaktiebolag* v. *Cliffe Steamship Co.*[21] and *A. E. Reed & Co. Ltd.* v. *Page, Son and East Ltd.*[22]; they take the doctrine of stages a little further. There are no cases under the Carriage of Goods by Sea Act which deal with stages as such—there are plenty of cases, of course, on due diligence. The shipowner's obligation is to make the holds fit to receive the goods at the time at which loading starts. There is some authority for the proposition that one looks at the common law position in considering this Act. In the last analysis this is a question of construction. This is very much a *Reed & Co.* case,[22] and if it was not for the Act the respondents would be in difficulties. In all these cases one has to look at the facts to see what is the degree of fitness that has to be achieved at the particular stage, and to decide whether or not that degree of fitness has been achieved at the beginning of that stage. There is no logical reason whatever for picking on the point when one closes the hatches in order to review the fitness of the vessel for the sea voyage.

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[18] [1951] 2 Lloyd's Rep. 265.

[19] [1942] A.C. 154, 162; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[20] [1905] 1 K.B. 697; 21 T.L.R. 345.

[21] [1932] 1 K.B. 490.

[22] [1927] 1 K.B. 743; 43 T.L.R. 272.

The sixth proposition is that the appellants have not proved any unseaworthiness of the nature set out in proposition (5) (supra), because at the beginning of the operation of the loading of the cargo the vessel was admittedly cargoworthy, and the next stage, namely, that at which fitness to proceed to sea was necessary, was never reached. The unseaworthiness complained of here was unfitness to proceed on her voyage. It is submitted that the loading stage does not necessarily and in every case end when the last of the cargo is on board—battening down, etc., is part of the loading. (7) If, contrary to the respondents' contentions, fitness to receive cargo falls to be judged at the time when the appellants' cargo began to be loaded, or perhaps separately as each parcel was loaded, the appellants have not shown that at those times the fire had begun, because there is no sufficient evidence of when the appellants' cargo was loaded. (8) If material unseaworthiness has been established by the appellants, the burden of proof shifts to the respondents, who must show that the unseaworthiness was not caused by any want of due diligence to make the vessel seaworthy and to make her fit to receive her cargo. It is submitted that this onus has been discharged by the respondents. Under article IV the respondents had to satisfy the court that the damage which arose from unseaworthiness was not caused by want of due diligence to make the vessel seaworthy. There is a vital difference here between making the vessel seaworthy and maintaining her in a seaworthy condition. It could not be said that in thawing out the scupper pipes the respondents negligently failed to make the vessel seaworthy—they negligently made her unseaworthy, which is an entirely different matter.

Lastly, proposition (9) is that article IV, rule 2 (*b*), protects the respondents at all events when, as in this case, unseaworthiness does not exist apart from fire. This is really an independent point. In this case there is no independent cause to which the appellants are able to go to as the real cause of this loss and say: "We are going to rely on that and you have no exception." [Reference was made to *Dominion Glass Co. Ltd.* v. *The Ship Anglo Indian.*[23]] Here the loss of the ship was directly due to

[23] [1944] S.C.R.(Can.) 409.

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fire; there is no independent cause of unseaworthiness at all. In all other cases the operative cause was something else than the fire; here one cannot find anything to which there is no exception. [Reference was made to Scrutton on Charterparties, 16th ed., p. 484, and to Carver's Carriage of Goods by Sea, 10th ed., p. 196.]

McKenzie Q.C. in reply. The time feature is involved in any application of the exceptions. If the material time of seaworthiness, and including cargoworthiness, is the time they load the ship, then it is immaterial what was the unseaworthiness, be it fire, or a leaking hull, or any particular matter which brings about the fact of unseaworthiness. If the ship, in fact, at the material time was unseaworthy, then if the respondents are unable to establish due diligence, they fail to bring themselves within the terms of the exception. Under any definition of unseaworthiness this ship was unseaworthy because of fire. [Reference was made to *Stag Line Ltd.* v. *Foscolo, Mango & Co. Ltd.*[24] and to Carver's Carriage of Goods by Sea, 10th ed., p. 165.] The carrier must be able to prove that at the moment he received the goods on board the ship was seaworthy in every respect. The language in Scrutton on Charterparties, 16th ed., at p. 483, is adopted.

[Counsel was stopped.]

June 22. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW, who stated the facts set out above and continued: In the view which their Lordships take the precise times of loading of No. 3 hold do not matter.

It was found by the trial judge and admitted before their Lordships that the officer who ordered and supervised the thawing was negligent. The cork insulation created a danger of fire and the man operating the torch should have been warned or some other method used.

On the pleadings the appellants claimed for their goods; the respondents relied on the immunities under article IV, rule 1 and rule 2 (*a*) and (*b*). They further submitted that they had performed their obligations under article III, rule 1. The appellants submitted that the respondents had not exercised due diligence to make the ship seaworthy within article III, rule 1; that the unseaworthiness so resulting caused the damage; and that in these circumstances the respondents could not rely on the immunities under article IV.

The District Judge in Admiralty found that the fire was due to the heat generated by the acetylene torch and this is not now disputed. It had been contended by the appellants that the presence of ice made the ship unseaworthy. This was rejected by the judge and this finding is not now disputed.

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[24] [1932] A.C. 328, 342, 350; 48 T.L.R. 127.

The judge held that the warranty of seaworthiness was not a continuing warranty. He held that on the evidence the appellants' cargo had been loaded before the attempt to thaw the ice had begun and that the ship was seaworthy at the "loading "stage." He further held that the question of seaworthiness for the voyage never arose as the ship never sailed. In these circumstances the respondents were entitled to rely on article IV.

One of the questions for decision in this appeal is whether the qualified obligation under article III, rule 1, applies only at stages or is a continuing obligation from at any rate the beginning of the loading down to the beginning of the voyage.

The Exchequer Court on appeal held that the fourth officer, and possibly the captain and chief engineer, were negligent in relation to the use of the acetylene torch. Cameron J. held that the presence of ice did not make the ship unseaworthy. He went on to consider whether "in the negligent use and application of "the acetylene torch, the respondents failed before and at the "beginning of the voyage to make the vessel seaworthy, and the "holds and all other parts of the vessel in which goods were carried "fit and safe for their reception, carriage and preservation "as required by rule 1 of article III." If the respondents had not so failed they would be entitled to immunity under article IV.

The judge held that the obligations under article III had been fully carried out before the thawing out operations started. He further held that on this basis the fire arose from negligence in the management of the ship. The respondents were therefore entitled to the benefit of rule 2 (*a*) of article IV. The court considered various authorities on what constituted management. It was further held that the respondents could rely on rule 2 (*b*) in that the negligence of the respondents' servants did not constitute actual fault or privity of the carrier.

In the Supreme Court the majority held that on the evidence the appellants' goods were not stowed until after the commencement of the fire. On the assumption that a plaintiff can only rely on unseaworthiness at the commencement of the loading, and that for this purpose the commencement of the loading means the commencement of the loading of each shipper's parcel and not the commencement of loading any cargo, the appellants had therefore established a breach of article III subject to due diligence. The Supreme Court held that the respondents had established due diligence. This was on the basis that due diligence need only be exercised by the owners personally or those who act for the owners in a managerial capacity, that is a class similarly restricted to that to which fault or privity has to be brought home under the fire clause. There was no evidence that members of that restricted class knew that the pipes were frozen or that an acetylene torch was to be used.

Cartwright J., dissenting, agreed with the finding that the appellants' goods were not stowed until the commencement of the fire. He held that an owner only escapes liability for damage caused by unseaworthiness if due diligence has been exercised not only by himself but by his experts, servants or agents. He further held that this failure to exercise due diligence caused the fire which amounted to unseaworthiness and caused the loss. He would have entered judgment for the appellants.

The question as to the scope of due diligence was dealt with by this Board in *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*[1]: "The condition"—that is, of the exercise of due diligence to make a vessel seaworthy—" is not fulfilled merely because the " shipowner is personally diligent. The condition requires that " diligence shall in fact have been exercised by the shipowner or " by those whom he employs for the purpose—see *Dobell & Co.* " v. *Steamship Rossmore Co.*[2] "

The failure to exercise due diligence by the fourth officer was therefore, if the matter becomes relevant, a failure to exercise due diligence by the carrier within article III, rule 1. On this point their Lordships agree with Cartwright J.

Before proceeding to consider the arguments it is convenient to state certain conclusions which appear plain to their Lordships. From the time when the ship caught on fire she was unseaworthy. This unseaworthiness caused the damage to and loss of the appellants' goods. The negligence of the respondents' servants which caused the fire was a failure to exercise due diligence.

Logically, the first submission on behalf of the respondents was that in cases of fire article III never comes into operation even though the fire makes the ship unseaworthy. All fires and all damage from fire on this argument fall to be dealt with under article IV, rule 2 (*b*). If this were right there was at any rate a very strong case for saying that there was no fault or privity of the carrier within that rule, and the respondents would succeed.

In their Lordships' opinion the point fails. Article III, rule 1, is an overriding obligation. If it is not fulfilled and the nonfulfilment causes the damage the immunities of article IV cannot be relied on. This is the natural construction apart from the opening words of article III, rule 2. The fact that that rule is made subject to the provisions of article IV and rule 1 is not so conditioned makes the point clear beyond argument.

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[1] (1937) 58 Ll.L.Rep. 33, 40.

[2] [1895] 2 Q.B. 408; 11 T.L.R. 501.

The further submissions by the respondents were based, as they had to be, on the construction of article III, rule 1. It was submitted that under that article the obligation is only to exercise due diligence to make the ship seaworthy at two moments of time, the beginning of the loading and the beginning of the voyage.

It is difficult to believe that this construction of the word "before" could have been argued but for the fact that this doctrine of stages had been laid down in relation to the absolute warranty of seaworthiness in English law.

It is worth, therefore, bearing in mind words used by Lord Macmillan with reference to the English Carriage of Goods by Sea Act, 1924, which embodied the Hague Rules, as does the present Act. "It is important to remember that the Act of 1924 "was the outcome of an International Conference, and that the "rules in the Schedule have an international currency. As these "rules must come under the consideration of foreign courts it is "desirable in the interests of uniformity that their interpretation "should not be rigidly controlled by domestic precedents of ante-"cedent date, but rather that the language of the rules should be "construed on broad principles of general acceptation." (*Stag Line Ltd.* v. *Foscolo, Mango & Co.*[3])

See Corocraft v Pan Am (196

In their Lordships' opinion "before and at the beginning of "the voyage" means the period from at least the beginning of the loading until the vessel starts on her voyage. The word "before" cannot in their opinion be read as meaning "at the "commencement of the loading." If this had been intended it would have been said. The question when precisely the period begins does not arise in this case, hence the insertion above of the words "at least."

On that view the obligation to exercise due diligence to make the ship seaworthy continued over the whole of the period from the beginning of loading until the ship sank. There was a failure to exercise due diligence during that period. As a result the ship became unseaworthy and this unseaworthiness caused the damage

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[3] [1932] A.C. 328, 350; 48 T.L.R. 127.

J. C.
1959

Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine Ltd.

to and loss of the appellants' goods. The appellants are therefore entitled to succeed.

It becomes therefore unnecessary to consider whether the Supreme Court were justified in holding that the appellants' goods were not stowed until after the commencement of the fire.

It is also unnecessary to consider the earlier cases as to "stages" under the common law. The doctrine of stages had its anomalies and some important matters were never elucidated by authority. When the warranty was absolute it seems at any rate intelligible to restrict it to certain points of time. It would be surprising if a duty to exercise due diligence ceased as soon as loading began, only to reappear later shortly before the beginning of the voyage.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be allowed and judgment entered for the appellants for $2,801.33.

The respondents must pay the appellants' costs of this appeal and in the courts in Canada.

Solicitors: *Waltons & Co.; Richards, Butler & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*

1958
Nov. 27;
Dec. 1, 2, 3, 4.

1959
Jan. 28.

DAVIE . . . . APPELLANT;

AND

NEW MERTON BOARD MILLS LTD. AND ANOTHER . . . . RESPONDENTS.

Negligence—Safe system of work—Plant and equipment—Latent defect—Injury to workman's eye caused by tool with latent defect—Tool supplied by reputable supplier—Tool made by reputable makers—Tool negligently made—Employers' liability.

A maintenance fitter was knocking out a metal key by means of a drift and hammer when, at the second blow of the hammer, a particle of metal flew off the head of the drift and into his eye, causing injuries. The drift, which had been provided for his use by his employers, although apparently in good condition, was of excessive hardness, and was, in the circumstances, a dangerous tool; it had been negligently manufactured by reputable makers, who had sold it to a reputable firm of suppliers who, in turn, had sold it to the employers, whose system of maintenance and inspection was not at fault. The fitter claimed damages for negligence against his employers on the ground that they had supplied him with a defective tool:—

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* *Present*: Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Keith of Avonholm.

Held, that the employers, being under a duty to take reasonable care to provide a reasonably safe tool, had discharged that duty by buying from a reputable source a tool whose latent defect they had no means of discovering.

Dicta of Lord Wright in *W. Angliss & Co. (Australia) Pty. Ltd.* v. *P. & O. Steam Navigation Co.* [1927] 2 K.B. 456, 460; 43 T.L.R. 675 and *Wilsons & Clyde Coal Co. Ltd.* v. *English* [1938] A.C. 57, 80; 53 T.L.R. 944; [1937] 3 All E.R. 628 explained.

Thomson v. *Cremin* [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185 distinguished.

Donnelly v. *Glasgow Corporation,* 1953 S.C. 107 overruled.

Dictum of Lord Herschell in *Smith* v. *Charles Baker & Sons* [1891] A.C. 325, 362; 7 T.L.R. 679 applied.

Mason v. *Williams & Williams Ltd.* [1955] 1 W.L.R. 549; [1955] 1 All E.R. 808 approved.

Decision of the Court of Appeal [1958] 1 Q.B. 210; [1958] 2 W.L.R. 21; [1958] 1 All E.R. 67 affirmed.

APPEAL from the Court of Appeal (Parker and Pearce L.JJ., Jenkins L.J. dissenting).

This was an appeal from an order of the Court of Appeal dated November 26, 1957, allowing an appeal by the first respondents, New Merton Board Mills Ltd. (the first defendants), from a judgment of Ashworth J. dated March 14, 1957, whereby he ordered that judgment should be entered in favour of the appellant, James Gibson Davie (the plaintiff), against both the first respondents and the second respondents, Frank Guylee & Son Ltd. (the second defendants), for the sum of £2,030 with costs to be paid as to 60 per cent. by the first respondents and 40 per cent. by the second respondents. The judge held that the first respondents should be indemnified to the extent of 100 per cent. of the amount of the damages by the second respondents. The Court of Appeal [1] allowed the appeal by the first respondents and directed that judgment should be entered for the appellant against the second respondents only and that judgment should be entered for the first respondents against the appellant. The Court of Appeal made consequential orders as to costs, the details of which were embodied in its formal order dated November 26, 1957.

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[1] *W. Angliss & Co. (Australia) Pty. Ltd.* v. *P. & O. Steam Navigation Co.* [1927] 2 K.B. 456 was not cited to the Court of Appeal.

The facts, stated by Viscount Simonds and Lord Morton of Henryton, were as follows:

On March 8, 1953, the plaintiff, a maintenance fitter employed by the first defendants at their factory at Merton, had occasion to separate two metal parts of a machine. The appropriate tool for this purpose was a tapered bar of metal about one foot long, known as a drift. It was a tool which was used for the purpose of separating one piece of metal from another when they had been brought together too tightly to be released by hand. The proper method of using a drift was to hold the pointed end against the junction of the parts to be separated, and to strike the thick end with a hammer. The plaintiff went to a cupboard containing drifts, provided by the first defendants for the use of their employees, took out a drift and began to work with it; but at the second stroke of the hammer the drift broke, and a piece flew off, struck the plaintiff's left eye and destroyed the sight of it. He struck the drift with a hammer, and there was no suggestion that there was anything wrong in what he did or the way he did it.

The plaintiff accordingly brought the action out of which this appeal arose against his employers, and at a later stage the manufacturers of the drift were joined as defendants. By his statement of claim the plaintiff claimed damages for negligence against both defendants. It was alleged that the first defendants, their servants or agents, were negligent in that "they failed to provide a suitable "drift which could be hammered safely without the risk of pieces "flying off." The following facts were proved or admitted at the trial: (1) That the drift was made by the manufacturers, an old established firm of toolmakers, in the year 1946: (2) That in July, 1946, they had sold it to a company called C. A. Baldwin & Co. Ltd., a reputable firm which sold tools of this kind: (3) That in response to an order for drifts from the respondents, C. A. Baldwin & Co. Ltd., in the same month delivered a supply which included the fatal drift: (4) That between July, 1946, and March, 1953, this drift had been seldom, if ever, used: (5) That the appellant properly took the drift from the respondents' store and that the accident occurred as the result of the second blow that he struck it with a hammer: (6) That the accident was solely due to the excessive hardness of the metal of the head of the drift: (7) That this excessive hardness was due to negligent heat treatment by the manufacturers: (8) That it was in apparently good condition and there was no negligence in the respondents' system of maintenance and inspection: (9) That the respondents bought the drift from a reputable firm of suppliers and paid a reasonable price for it: (10) That no intermediate examination of it between the time of its manufacture and the time of its actual use was reasonably to be expected: (11) That it was unreasonable to expect an employer to test a drift for hardness before issuing it to his employee: and (12) That no examination short of a test would have revealed the danger existing in this particular drift.

Martin Jukes Q.C. and *Malcolm Morris* for the appellant. The duty owed by a master to his servant to exercise due care and skill in the provision of proper appliances for the use of the servant is not fulfilled when the master obtains for the use of his servants from a reputable supplier appliances which were in fact negligently manufactured and defective. Therefore the first respondents were guilty of a breach of this duty to the appellant which caused him injury.

The onus is on the employer throughout, once it is shown that there is a defective tool which has caused the injury. The employer can only discharge the onus if all reasonable care has in fact been taken to ensure the soundness of the tools by everyone concerned, including the manufacturers: see *Baird* v. *Addie* [2] and Glegg on Reparation, 4th ed., p. 384. In the discharge of his duty an employer is not entitled to go to an independent contractor, however competent. These employers were under a duty to test the drift. See *Weems* v. *Mathieson* [3] and also *Wilson* v. *Merry & Cunningham*,[4] which show that the master is liable for defective plant, whether or not he has been negligent.

The general principle is that the master must provide materials and machines which are suitable to his servants. That is the thread running through the Scottish cases. Merely taking care to find a suitable supplier is not taking care in the sense of the duty. The workman is provided with tools by his employer; he has no choice, though, if it is deficient, he may know that it will cause him serious injury. See *M'Killop* v. *North British Railway Co.*[5]; *Macdonald* v. *Andrew Wylie & Son* [6]; *Smith* v. *Charles Baker & Sons* [7]; *Toronto Power Co. Ltd.* v. *Paskwan* [8] and *Bain* v. *Fife Coal Co. Ltd.*[9]

If a tool is defective the master must be responsible; it matters not who made it. Reliance on somebody else is not enough. He is under an absolute personal obligation to supply proper tools to his men, and does not fulfil it by buying defective tools on the market. There are torts for which a man is responsible, even though the fault lies on an independent contractor and no blame attaches to him. There is, therefore, a branch of the law of tort in which a man may be charged with negligence which is not his own. See *Ovington* v. *M'Vicar*[10]; *R. T. Wood & Co.* v. *Mackay*[11]; *Wilsons & Clyde Coal Co. Ltd.* v. *English*[12]; *Paine* v. *Colne Valley Electricity Supply Co. Ltd.*[13]; *Donnelly* v. *Glasgow Corporation*[14] and *Mason* v. *Williams & Williams Ltd.*[15] (which was wrongly decided).

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[2] (1854) 16 D. 490.

[3] (1861) 4 Macq.H.L. 215, 226.

[4] (1867) 5 M. 807, 811; (1868) L.R. 1 Sc. & D. 326.

[5] (1890) 23 R. 768.

[6] (1898) 1 F. 339.

[7] [1891] A.C. 325, 356, 362; 7 T.L.R. 679.

[8] [1915] A.C. 734.

[9] 1935 S.C. 681, 690.

If the employer's duty is to take all reasonable care, such a duty cannot extend to premises over which he has no control at all. But if *Donnelly's* case[16] was rightly decided, he cannot get rid of the duty by entrusting its execution to a contractor. The distinction between ordering tools and going onto a third party's premises is that, in the first case, there is some claim. Reliance is placed on what Jenkins L.J. said in the Court of Appeal in the present case.[17] See also *Hodgson* v. *British Arc Welding Co. Ltd.*[18]; *Thompson* v. *Cremin*[19] and *Haseldine* v. *C. A. Daw & Son Ltd.*[20] *Biddle* v. *Hart*[21] does not really help in the present case. In *W. Angliss & Co. (Australia) Pty. Ltd.* v. *P. & O. Steam Navigation Co.*[22] Wright J. refused to draw a distinction, as being illogical, between a carrier's obligations if he had bought his ship and his obligations if he had it built. But the decision was that he was not liable for the negligence of the shipbuilders. There is, however, no exact parallel between the duty of an employer and that of a carrier under the Carriage of Goods by Sea Act. See also *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*[23]; *Waddle* v. *Wallsend Shipping Co. Ltd.*[24] and *Riverstone Meat Co. Pty. Ltd.* v. *Lancashire Shipping Co. Ltd.*[25] The general comment on this group of four shipping cases is that the courts were there considering problems wholly different from that involved in the present appeal. They were considering the effect of a statutory duty which did not affect the common law. The duty under the Carriage of Goods by Sea Act affects the duties under the Hague Rules. The Act gave effect to international agreement. It is dangerous to draw too close a parallel between such a statutory duty and the common law. There is no conflict between what Lord Wright said in the *Wilsons & Clyde Coal Co.* case [26] and what he said in the *Angliss* case.[27] He was not intending to draw any exact parallel. It would be illogical to say that the employer is liable if he goes to an independent contractor who makes a tool for him but is not liable if he goes to a contractor who gets the tool elsewhere.

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[10] (1864) 2 M. 1066.

[11] (1906) 8 F. 625, 633.

[12] 1936 S.C. 883; [1938] A.C. 57, 78, 80, 87–88; 53 T.L.R. 944.

[13] (1938) 55 T.L.R. 181, 183; [1938] 4 All E.R. 803.

[14] 1953 S.C. 107.

[15] [1955] 1 W.L.R. 549; [1955] 1 All E.R. 808.

[16] 1953 S.C. 107.

[17] [1958] 1 Q.B. 210, 233; [1958] 2 W.L.R. 21; [1958] 1 All E.R. 67.

[18] [1946] K.B. 302, 304; 62 T.L.R. 275; [1946] 1 All E.R. 95.

[19] [1956] 1 W.L.R. 103n., 105–106, 109–110; [1953] 2 All E.R. 1185.

[20] [1941] 2 K.B. 343, 355–356, 374; 58 T.L.R. 1; [1941] 3 All E.R. 156.

[21] [1907] 1 K.B. 649; 23 T.L.R. 262.

[22] [1927] 2 K.B. 456; 43 T.L.R. 675.

[23] [1934] A.C. 538, 546 et seq.; 51 T.L.R. 5.

[24] [1952] 2 Lloyd's Rep. 105, 126–128.

[25] [1959] 1 Q.B. 74; [1958] 3 W.L.R. 482; [1958] 3 All E.R. 261.

The contentions of the appellant are that it is the duty of an employer to take reasonable care to provide proper appliances for his men. That is an absolute obligation. It is not enough for him to entrust someone else with the business of taking reasonable care to ensure the soundness of the tools. On the true reading of what Lord Wright said in the *Wilsons & Clyde Coal Co.* case [28] the employer cannot escape liability by merely relying on the servant or agent of someone especially employed in the particular task of making tools. The employer is vicariously liable even though the independent contractor must work through servants over whom the employer has no control. It is possible for a man to be liable for the acts of the servants of contractors over whom he has no control. It is an easy and logical step to liability for tools bought from a middleman. When one is liable for the acts of an independent contractor, there is liability without control and control ceases to be a test of liability. What Lord Maugham said in the *Wilsons & Clyde Coal Co.* case [29] covers the principle of liability for an independent contractor. In *Donnelly's* case [30] the supplier was treated as the equivalent of the manufacturer.

If an innocent man loses the sight of his eye it is strange if it can be said that he has no remedy.

A Canadian decision helpful to the appellant is *Marshment* v. *Borgstrom.*[31]

Once one has brought in liability for any independent contractor, there is no logical stopping place on the road to bringing them all in. There are many matters which an employer cannot do for

[26] [1938] A.C. 57, 78, 80.
[27] [1927] 2 K.B. 456, 460.
[28] [1938] A.C. 57, 78, 80.
[29] Ibid. 87–88.
[30] 1953 S.C. 107.
[31] [1942] S.C.R. 374.

himself. He may go to a skilled independent person who may do the work on his own premises or on the employer's, or who may sell the employer a tool. It is hard to distinguish between the employer's liability in any of these cases. These duties spring from contract and are based on contract. The contract of employment must imply an undertaking that the master shall provide tools. It is an invariable custom that the employee must take the tools provided. The duty is a duty of care to provide suitable tools. The object is that danger should not be caused to the workman. The obligation is so important that it cannot be delegated. Care must be taken to make the tools properly because, unless they are carefully manufactured, danger will ensue. Merely buying from a reputable manufacturer and relying on that does not discharge the duty. Reliance is placed on what Jenkins L.J. said in the Court of Appeal.[32]

In summary, the duty of the master is to take reasonable care to provide proper appliances. But the obligation to take that degree of care per se or per alios is absolute. This obligation can only be discharged by the master if all reasonable care has been taken to ensure the soundness of the tools. It is not enough that the master may have entrusted to someone else the taking of all reasonable care or has assumed that someone else has taken, or would take, all reasonable care to ensure the soundness of the tools. Here reasonable care was not in fact taken by the manufacturers, and that is enough to make the respondents liable. It does not matter that the employer, his servants or agents, have taken all reasonable care to provide proper appliances. It is true that here there is no contractual relationship between the employers and the manufacturers. In some cases it might be that the negligent person was one who supplied materials or parts to the manufacturers. In other cases the employer might be relying on the high reputation of the merchant who supplied him. All this is immaterial; if someone somewhere was guilty of negligence or want of reasonable care in the manufacture, maintenance or inspection of the appliance, and this caused damage, the employers are liable. They will only be absolved if the latent defect arose without negligence and could not be discovered by the maker. If, instead of buying standard tools from the maker or from a merchant, an employer had them made to his own design, then, if they were defective, there can be no doubt that he would be liable.

[32] [1958] 1 Q.B. 210, 230.

Malcolm Morris following. The true basis of the case of *Wilsons & Clyde Coal Co.*[33] appears from the report of the proceedings in the Court of Session.[34]

In general, only the person on whom a duty is laid can discharge it, but difficulty arises in this sort of case where the discharge of his duty by an employer involves the adoption of a past act of negligence by someone else. To speak of "delegation" is misleading; it is a difficult concept, but negligence by the adoption of a previous negligent act is not hard to conceive. One may perform a duty oneself, or get someone else to do so, or adopt something already done by someone else.

With negligence in manufacture there are two elements, two acts, one subsequent to the other in time, which make up the negligence. The two elements are (1) the making, and (2) providing the tool for the purpose for which it was meant. The concept of negligence by adopting a past act of negligence is not strange. Until *Donnelly's* case [35] and *Mason's* case [36] there were no direct authorities dealing with this point.

To succeed, the plaintiff must prove negligence against someone. Since *Donoghue* v. *Stevenson* [37] if the manufacturer is known the plaintiff can proceed against him, but in *Donnelly's* case [38] it was held competent to go against the master alone and not against the manufacturer. The master can get a right of indemnity against the manufacturer in respect of damages paid to an injured plaintiff. The employer has long been regarded as the best person for an injured workman to sue: see *Baird* v. *Addie*.[39]

The results of drawing the line where the majority of the Court of Appeal drew it are irrational.

R. Marven Everett Q.C. and *H. Tudor Evans* for the first respondents. An employer's duty to his servant is to take reasonable care, by himself and his servants or agents appointed for the purpose, to provide proper appliances and to maintain them in a proper condition and so to carry on his operations as not to submit those employed by him to an unnecessary risk.

Marshment v. *Borgstrom* [40] appears to be based on the conception of contract. That is not the right view of the basis of the duty which an employer owes to his workmen. Accordingly, it loses a good deal of its force. The difference between the duty in relation to tort and the duty arising out of contract is important. In contract there may be implied a term that all reasonable care has been taken, while in tort the employer must be personally liable or vicariously liable.

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[33] [1938] A.C. 57.
[34] 1936 S.C. 883, 894, 900–901, 903–904, 908, 910.
[35] 1953 S.C. 107.
[36] [1955] 1 W.L.R. 549.
[37] [1932] A.C. 562; 48 T.L.R. 494.
[38] 1953 S.C. 107.
[39] 16 D. 490.
[40] [1942] S.C.R. 374.

Junor v. *International Hotel Co. Ltd.*[41] is relied on. The argument expressed by Clute J.[42] is the highest that the case can be put against the respondents.

The findings of Ashworth J. in the present case [43] are conclusive in favour of the respondents.

Three questions arise: (1) What is the nature of the employer's duty to his workmen? (2) What is its extent? (3) What discharges the employer's duty? Under (1) the question arises: Is the nature of the duty contract or tort? If it is tort, the liability can only be (a) personal or (b) vicarious, and so under (2) the question arises: What is the extent of the vicarious liability? As to (3), it is submitted that the duty is discharged by such conduct by the employer as would, in the court's opinion, be observed by a hypothetical reasonable and prudent employer in like circumstances in order to avoid exposing his workmen to unnecessary risk of injury. At the highest the duty must be discharged by the employer, his servant or agent appointed for that purpose.

The historical background of the matter is that the employer's liability has been obscured by the doctrine of common employment which prevailed from 1837 to 1948, starting with *Priestley* v. *Fowler.*[44] There are no authorities as to employer's liability before that period. The doctrine of common employment was made part of the law of Scotland by *Bartonshill Coal Co.* v. *Reid.*[45] There have been three events justifying the House of Lords in re-examining the employer's common law liability: (1) the decision of *Smith* v. *Charles Baker & Sons*,[46] (2) the decision of *Donoghue* v. *Stevenson* [47] and (3) the abolition of the defence of common employment by the Law Reform (Personal Injuries) Act, 1948. No question of common employment arose in *Smith* v. *Charles Baker & Sons.*[48] After *Donoghue* v. *Stevenson* [49] it was possible for the servant to sue the independent contractor direct. After the Act of 1948 it was no longer necessary to preserve the artificial considerations to which the doctrine had given rise.

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[41] (1914) 32 O.L.R. 399, 409.
[42] Ibid. 417.
[43] [1957] 2 Q.B. 368, 380; [1957] 2 W.L.R. 247; [1957] 2 All E.R. 38.
[44] (1837) 3 M. & W. 1.
[45] (1858) 3 Macq.H.L. 266.
[46] [1891] A.C. 325.
[47] [1932] A.C. 562.
[48] [1891] A.C. 325.
[49] [1932] A.C. 562.

As to question (1), employer's liability is part of the general law of tort. Under that law a man is not liable for the negligence of an independent contractor except in special circumstances: see *Honeywill & Stein Ltd.* v. *Larkin Brothers (London's Commercial Photographers) Ltd.*[50] and *Penny* v. *Wimbledon Urban District Council.*[51] Only if he is undertaking some intrinsically dangerous operation, or if a danger is created on the highway, or if there is an absolute statutory duty, is an employer liable for the negligence of an independent contractor. Apart from this, the employer's liability at its highest is for his own negligence or that of his servants or agents appointed specially for that purpose, for example, making a tool for a particular purpose. The employer's liability to his workmen falls into the general picture of the law of tort. An employer buying tools is only liable for the negligence of a supplier if he goes to him with a blue-print, thus passing on to him the doing of the very thing he would do himself. That goes far beyond merely buying a tool from a supplier. The master is not liable to his own servant for the independent contractor's negligence unless he has delegated to the independent contractor something which it is his duty to do himself. It is not part of his duty to make the tools which he supplies to his workmen.

The true position is that the employer's duty is not to be subdivided into duty as regards tools, plant and system of work. There is a single duty to take reasonable care. It may be that in particular circumstances the court might hold that it was negligent of an employer not to leave the making of a certain article to an expert. Or in the case of an everyday article it might be held that the employer should have checked the article himself. The authorities which show that the duty is part of the law of tort are these: *Smith* v. *Charles Baker & Sons*[52]; *Baker* v. *James Brothers & Sons Ltd.*[53]; *Nicholls* v. *F. Austin (Leyton) Ltd.*[54]; *Winter* v. *Cardiff Rural District Council*[55] and *Paris* v. *Stepney Borough Council.*[56] See also section 2 (1) (*a*) of the

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[50] [1934] 1 K.B. 191; 50 T.L.R. 56.

[51] [1899] 2 Q.B. 72; 15 T.L.R. 348.

[52] [1891] A.C. 325, 353–354, 362.

[53] [1921] 2 K.B. 674; 37 T.L.R. 591.

[54] [1946] A.C. 493, 503–504, 507; 62 T.L.R. 320; [1946] 2 All E.R. 92.

[55] [1950] 1 All E.R. 819, 822, 823, 825; 114 J.P. 234, 237, 238, 240–241.

[56] [1951] A.C. 367, 375; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

Crown Proceedings Act, 1947. The case of *Wilsons & Clyde Coal Co.*[57] rejects the contractual liability. The answer to the first question is that the liability is in tort.

As to question (2), *Wilsons & Clyde Coal Co.*[57] is no authority for the appellant's extreme propositions, which could affect all employers, domestic, industrial and commercial. For example, an employer would be liable if an independent contractor used an acetylene torch on an old oil tank, causing an explosion and injuring his servant. If an employer's housekeeper were sent shopping in his car driven by his chauffeur, by whose negligence she was injured, the employer would admittedly be liable, but the employer would not be liable if she were sent by taxi and were injured. But on the appellant's argument her employer would be liable in the second case too, even if the accident were due to a badly manufactured piece of steel. The principle would apply to domestic service as much as to industry. There is no indication in *Smith* v. *Charles Baker & Sons*[58] that the duty on the employer extends further than one not to expose his employee to unnecessary risks. See *Wilsons & Clyde Coal Co. Ltd.* v. *English*,[59] *Barwick* v. *English Joint Stock Bank*[60] and *Lloyd* v. *Grace, Smith & Co.*[61] As to liability for independent contractors, see *Green* v. *Fibreglass Ltd.*[62] In *Thomson* v. *Cremin*[63] the underlying thought in the mind of the House was that a shipowner cannot be heard to say that he did not know how his cargo was loaded on his own ship, but that is a special case. While a shipowner must be taken to know what goes on in his ship, a householder, for example, need not be taken to know what goes on in his attic.

Even on the case of *Wilsons & Clyde Coal Co.*[64] the appellant cannot succeed; there is no unbridgeable gap between that case and this. No statement goes beyond the liability of the employer for the discharge of current or existing obligations to his servant, for example, in the system of work type of case.

As to question (3), the toolmakers were never the agents or servants of these employers for the purpose of discharging the employers' duty to their workmen.

If it is reasonable that an employer should perform a duty himself, he will not relieve himself from liability by getting someone else to do it, in the event of the task not being carried out with reasonable care. If the court thinks it reasonable for an employer to perform a duty by his own servant, he remains liable for the negligence of that servant in its performance; respondeat superior. If the court thinks that reasonable care by the employer justifies or requires the employment of some independent contractor, then the employment of an apparently competent independent contractor will discharge the employer's duty of reasonable care. Very different actions may be needed to discharge the duty according to the circumstances. Expert work will fall into a separate category. For example, in the case of wiring a house for electricity, the duty is discharged by getting an expert to do it for one: see *Green* v. *Fibreglass Ltd.*[65]; the case of *Honeywill & Stein Ltd.*[66]; *Read* v. *J. Lyons & Co. Ltd.*[67]; *Cole* v. *de Trafford (No. 2)*[68]; *Wilson* v. *Tyneside Window Cleaning Co.*[69]; *Hodgson* v. *British Arc Welding Co. Ltd.*[70]; *Taylor* v. *Sims & Sims*[71] and *Cilia* v. *H. M. James & Sons.*[72]

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[57] [1938] A.C. 57.

[58] [1891] A.C. 325.

[59] [1938] A.C. 57, 71, 72, 73, 75, 78, 81, 86.

[60] (1867) L.R. 2 Ex. 259, 265.

[61] [1912] A.C. 716, 726; 28 T.L.R. 547.

[62] [1958] 2 Q.B. 245, 248; [1958] 3 W.L.R. 71; [1958] 2 All E.R. 521.

[63] [1956] 1 W.L.R. 103n.

[64] [1938] A.C. 57.

The reasoning of Devlin J. in *Waddle* v. *Wallsend Shipping Co. Ltd.*[73] plainly established the principle that one must not carry an inquiry into an unlimited retrogression beyond the point to which a reasonable employer can be expected to go.

A master is liable for his own negligence and that of his servants but not for the negligence of persons remote from him in time and relationship. *Baird* v. *Addie*[74] is a case of entrusting an employer's job on the employer's own premises to someone else. In *Weems* v. *Mathieson*[75] the danger was patent. *Wilson* v. *Merry & Cunningham*[76] does not establish the proposition suggested by the appellant: see *per* Lord Cairns L.C. in the House of Lords in that case.[77] In *Macdonald* v. *Andrew Wylie & Son*[78] Lord Moncrieff was more in touch with the current of authority than the other judges and what he said is adopted. The appellant tried to rely on *Smith* v. *Charles Baker & Son*,[79] but Lord Watson in the passage relied on, which stands very much by itself, was doing no more than reject a subjective test. In *Donnelly's* case [80] the law did not connect with the facts as stated. It is a wrong decision and should be overruled. It is not contended that any other case was wrongly decided. The view of Jenkins L.J. in the Court of Appeal as to the decisions binding on him is fallacious. His view would make the employer an insurer or guarantor and begs the question.

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[65] [1958] 2 Q.B. 245.

[66] [1934] 1 K.B. 191.

[67] [1947] A.C. 156; 62 T.L.R. 646; [1946] 2 All E.R. 271.

[68] [1918] 2 K.B. 523.

[69] [1958] 2 Q.B. 110; [1958] 2 W.L.R. 900; [1958] 2 All E.R. 265.

[70] [1946] K.B. 302.

[71] (1942) 167 L.T. 414, 415–416; 58 T.L.R. 339; [1942] 2 All E.R. 375.

[72] [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9.

[73] [1952] 2 Lloyd's Rep. 105.

[74] 16 D. 490.

[75] 4 Macq.H.L. 215.

[76] 5 M. 807, 811.

[77] L.R. 1 H.L.Sc. 326, 332.

[78] 1 F. 339, 347.

[79] [1891] A.C. 325, 356.

Martin Jukes Q.C. in reply. In *Junor's* case [81] the present point was not considered. It was decided before the *Wilsons & Clyde Coal Co.* case.[82] *Marshment's* case [83] is of more help. *Baker* v. *James Brothers & Sons Ltd.*[84] and *Cole* v. *de Trafford (No. 2)* [85] are irrelevant and do not help here. It is not appropriate to divide into rigid categories the occasions on which an employer is liable for the negligence of an independent contractor: see *Dalton* v. *Henry Angus & Co.*[86] and *Hole* v. *Sittingbourne and Sheerness Railway Co.*[87] *Thomson* v. *Cremin* [88] is a binding decision of this House. See also p. 6 of the third report of the Law Reform Committee (1954 Cmd. 9305).

Their Lordships took time for consideration.

January 28, 1959. Viscount Simonds. My Lords, this appeal raises a question of far-reaching consequence. [His Lordship stated the facts and continued:] Some of these findings and admissions were, no doubt, more relevant to the claim against the manufacturers than that against the respondents. So far as the latter are concerned it is sufficient to say that to them the defect in the drift was latent and not to be discovered by any inspection they could reasonably be expected to make.

It is with this background that the question thus stated by Ashworth J., who tried the case, must be examined, namely, whether the respondents are responsible to the appellant because the drift was negligently manufactured by the manufacturers. The learned judge held that they were; the Court of Appeal (Parker and Pearce L.JJ., dissentiente Jenkins L.J.) that they were not. I interpose, for the sake of clarity, that the learned judge held that the manufacturers also were liable on the principle of *Donoghue* v. *Stevenson* [1] and gave judgment against both defendants for £2,030 with orders as to indemnities and costs which need not now be considered, and that the Court of Appeal, allowing an appeal by the present respondents, directed that the judgment for the appellant should be entered against the manufacturers only with consequential orders as to costs. The appellant, not being satisfied with judgment against the manufacturers only, brings this appeal by which he seeks to make his employers also liable. It is possible that he or others have an eye on those far-reaching consequences of which I have spoken. But, at any rate, he is entitled to appeal.

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[80] 1953 S.C. 107.

[81] 32 O.L.R. 399, 400, 404.

[82] [1938] A.C. 57.

[83] [1942] S.C.R. 374.

[84] [1921] 2 K.B. 674.

[85] [1918] 2 K.B. 523

[86] (1881) 6 App.Cas. 740, 829.

[87] (1861) 6 H. & N. 488.

[88] [1956] 1 W.L.R. 103n.

[1] [1932] A.C. 562; 48 T.L.R. 494.

My Lords, in the course of a hearing which lasted many days a great number of authorities were cited. But it appears to me that no cases were cited in which the facts were similar to those now under consideration, except two. These were, first, a case heard by Finnemore J. in 1955 (*Mason* v. *Williams & Williams Ltd.*[2]) in which the learned judge held upon very similar facts that the employers were not liable and did so in a judgment which, if it was not good law, was notably good sense: it appears that the case was heard at the Chester Assizes and he was not embarrassed by the citation of authority. The second case, in which there was by no means the same degree of similarity, was a Scottish case, *Donnelly* v. *Glasgow Corporation.*[3] Here the question was fully argued and the employers were held liable. I defer the further consideration of this case.

Before I turn to the examination of the cases by which it may be supposed that guiding authority is given, I would remind your Lordships that this action was founded in tort. The accident, it was said, was caused by the negligence of the respondents, their servants or agents, and their negligence consisted in this, that they failed to provide a suitable drift which could be hammered safely without the risk of pieces flying off. I have deliberately used the language of the statement of claim which has been repeatedly used in these proceedings. It may be relevant to observe that it is not strictly accurate. The accident occurred not through a failure to supply a suitable drift—a failure that could result in nothing—but through the supply of an unsuitable drift. Therein lay their alleged negligence, and I pause to analyse that allegation. It may mean one of two things. First, it may mean that it was the duty of the respondents to supply suitable drifts: they supplied an unsuitable one: they did not do their duty: therefore they were negligent. This is a bare statement of

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[2] [1955] 1 W.L.R. 549; [1955] 1 All E.R. 808.

[3] 1953 S.C. 107.

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absolute obligation. But, secondly, it may mean that the supply of an unsuitable drift was due to a want of reasonable care on their part. It must, then, be shown wherein lay the want of reasonable care, and at once the question arises, for whose negligence, acts, I suppose, of omission and commission, the employer is liable in the long chain which ends with the supply by him of a tool to his workman but may begin with the delving of the raw material of manufacture in a distant continent. In the case before us the chain is long enough. The respondents were not guilty of any negligence nor was any servant or agent of theirs nor was the reputable firm who supplied the drifts, but at the end of the chain were the manufacturers. The respondents stood in no contractual relation to them: so little connection was there between them that it was long in dispute whether the fatal drift had been manufactured by them and delivered by them to the suppliers. But it is for their negligence in manufacture that the appellant would make the respondents liable. Remembering, my Lords, that the essence of the tort of negligence lies in the failure to take reasonable care, I am constrained to wonder how this thing can be. But it is made clear by the powerful dissenting judgment of Jenkins L.J. that, if such a result cannot commend itself to reason, it yet may find support in authority. I say that it cannot commend itself to reason; for, if indeed it is the law, every man employing another and supplying him with tools for his job acts at his peril: if someone at some time has been careless, then, for any flaw in the tools, it is he who is responsible, be he himself ever so careful. I observe that such a view of the law is usually accompanied by a disclaimer of any idea that an employer warrants the fitness of the tool he supplies and do not find the reconciliation easy.

My Lords, in the consideration of the very numerous cases which may be thought to have some bearing on this matter, two things should be borne in mind. In the first place, in England for the 100 years between the decision in *Priestley* v. *Fowler* [4] and the abolition of the doctrine of common employment, and for a somewhat shorter period in Scotland, the determination to avert, or at least reduce, the consequences of that decision led to a great deal of artificiality and refinement which would have been otherwise unnecessary. The shadow of it is still upon us. But we can at least return to the simple question which is at the bottom of it all: "Has the employer taken reasonable care for the safety of "the workman?", a question which can only be answered in each case by a consideration of all its circumstances. In the second place, it is well to remember that we are dealing with a case of tort. The same act or omission by an employer may support an action in tort or for breach of an implied term of the contract of employment but it can only lead to confusion if, when the action is in tort, the court embarks on the controversial subject of implied contractual terms. I would venture a third general observation. Just as the law imposes a certain standard of care upon an employer in relation to his workman, so it imposes on the occupier of land a certain standard of care in relation to those who enter on it, and in this regard there were refinements which may now be forgotton. It may well be that the standard of reasonable care in both relations is in certain circumstances the same. It may, too, be useful to argue by way of analogy from one to another. But I would deprecate any direct appeal to cases between invitor and invitee for the purpose of determining the measure of responsibility of an employer to his workman. Particularly I think it is inept where the question is as to the liability of the employer for acts of a third party, independent contractor or another, of which he had not, and could not reasonably have had, knowledge. To that I now return, for it is in this case the very heart of the matter.

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[4] (1837) 3 M. & W. 1.

My Lords, let me remind your Lordships that the respondents are liable (if they are liable) for the accident to the appellant because the manufacturers were careless, and for that carelessness they must assume vicarious responsibility. That is a conclusion, said Jenkins L.J., which the Court of Appeal was constrained on the authorities to adopt. He observed [5] that that did not " entail the substitution of an absolute duty to ensure safety " for the duty of reasonable care enunciated in *Smith* v. *Charles* " *Baker & Sons* [6] and accepted passim by the House of Lords in " *Wilsons & Clyde Coal Co. Ltd.* v. *English.*[7] " " The duty," he said, " remains a duty of reasonable care, but the obligation " to take that degree of care per se or per alios is an absolute " obligation." With great respect to the Lord Justice, I find this a difficult proposition to interpret and apply. If indeed it means that the employer is responsible for lack of care shown by anyone in the long chain to which I referred earlier in this opinion, then it is for practical purposes indistinguishable from the standard of absolute obligation which is disclaimed. If it means anything else, if it is necessary to determine who are the alii for whose default the employer is responsible, then the question is once more open. At what stage is the act or omission of a third party something for which the employer is responsible or no longer responsible?

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[5] [1958] 1 Q.B. 210, 236; [1958] 2 W.L.R. 21; [1958] 1 All E.R. 67.

[6] [1891] A.C. 325, 362; 7 T.L.R. 679.

[7] [1938] A.C. 57; 53 T.L.R. 944.

My Lords, I would begin, as did Parker L.J., with a reference to the familiar words of Lord Herschell in *Smith* v. *Charles Baker & Sons*[8] in which he describes the duty of a master at common law as "the duty of taking reasonable care "to provide proper appliances, and to maintain them in a proper "condition, and so to carry on his operations as not to subject "those employed by him to unnecessary risk," words that are important both in prescribing the positive obligation and in negativing by implication anything higher. The content of the duty at common law, thus described by Lord Herschell, must vary according to the circumstances of each case. Its measure remains the same: it is to take reasonable care, and the subject-matter may be such that the taking of reasonable care may fall little short of absolute obligation. I find nothing in the earlier cases, in either the English or Scottish courts, to which our attention was called, that requires any qualification of this statement, though there are dicta which, taken out of their context, might appear to do so.

But, my Lords, as I have said, the difficulty arises, not on the primary statement of liability, but upon the question for whom is the employer responsible. Clearly he is responsible for his own acts, and clearly, too, for those of his servants. To them at least the maxims respondeat superior and qui facit per alium facit per se will apply. It is the next step that is difficult. The employer is said to be liable for the acts of his "agents" and, with greater hesitation, for the acts of "independent contractors." My Lords, fortunately we are not troubled here with the word "agent." No one could say that a manufacturer who makes a tool and supplies it to a merchant who in turn sells it to an employer is in any sense an agent of the latter for providing his workman with a tool. Is he then an independent contractor? It is perhaps a striking commentary on the artificiality of this concept that it should for a moment be thought possible to regard as an independent contractor with an employer a manufacturer with whom he never contracted, of whom he may never have heard and from whom he may be divided in time and space by decades and continents. It may lead your Lordships to the conclusion that the liability of the employer in such a case can only be sustained if his obligation is absolute. But that ex hypothesi it is not.

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[8] [1891] A.C. 325, 362.

How comes it, then, that Jenkins L.J., from whom, like his brethren in the Court of Appeal, I differ with diffidence, was constrained to hold the present respondents liable? I think that it was largely due to the observations of Lord Wright and Lord Maugham in *Wilsons'* case.[9] That was a case in which (I cite the words of Lord Macmillan) it fell to this House to consider and accommodate the spheres of operation in the law of master and servant of two competing doctrines, the doctrine of vicarious liability and the doctrine of common employment, according to the former of which a master is responsible for the negligence of his servant acting within the scope of his employment and according to the latter he is not responsible for the negligence of his servant causing injury to a fellow servant. "Which of these two principles," said Lord Macmillan,[10] "is applicable to the present case?" The question at issue was remote from that in the present case. No one now doubts that an employer cannot escape liability by appointing an agent to perform the employer's obligation on his behalf. An attempted departure from this broad principle in *Fanton* v. *Denville* [11] had been rejected by the Lord Justice-Clerk in *Bain* v. *Fife Coal Co. Ltd.*[12] and this was the main subject of debate in *Wilsons'* case.[13] I would reinforce what I have said by referring to almost the first words of Lord President Normand in the same case [14]: "This court was convened," he said, "to consider two general questions on an employer's liability to one of "his servants for personal injury. The first and broader question "is whether the employer must answer at common law on the "principle respondeat superior for a defective system of working "negligently provided or permitted to be carried on by a servant "to whom the duty of regulating the system of working has been "delegated by the employer." That was the only relevant question for decision. It was assumed throughout that the manager whose negligence had caused the accident was a servant of the employer. No question arose either in the Court of Session or in this House who should be regarded as a servant for whose negligence the employer must be held liable. There is an

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[9] [1938] A.C. 57.

[10] Ibid. 75.

[11] [1932] 2 K.B. 309; 48 T.L.R. 433.

[12] 1935 S.C. 681, 693.

[13] [1938] A.C. 57.

[14] 1936 S.C. 883, 894.

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illuminating passage in the judgment of the Lord President.[15] He refers to the judgment of the Lord Justice-Clerk in *Bain*,[16] who there asserted it to be a fundamental doctrine of the law of master and servant that there are certain duties owed by a master to his servant so imperative and vital to safety that the master cannot divest himself of responsibility by entrusting their performance to others, so as to avoid liability in the event of injury arising to the servant through neglect of any of those duties. "I agree," said Lord Normand, "with this opinion, subject to "the explanation, which is to be gathered from the context, that, "when delegation to others is spoken of, it is delegation to "servants that is meant." It is legitimate, therefore, to approach *Wilsons'* case[17] with the warning that anything said about the default of any person other than the employer and his servants cannot be regarded as relevant to the decision. Of the noble and learned Lords who took part in that case I do not think that Lord Atkin or Lord Thankerton or Lord Macmillan said anything, even alio intuitu, which could give support to the appellant. I turn then to Lord Wright, upon whose observations reliance was placed. I repeat that all that was said was in the setting of the current conflict with the doctrine of common employment, and I first note that the learned Lord,[18] after referring to "those fundamental "obligations of a contract of employment which lie outside the "doctrine of common employment, and for the performance of "which employers are absolutely responsible," added: "When "I use the word absolutely, I do not mean that employers "warrant the adequacy of plant, or the competence of fellow-"employees, or the propriety of the system of work. The obliga-"tion is fulfilled by the exercise of due care and skill. But it is "not fulfilled by entrusting its fulfilment to employees, even "though selected with due care and skill." It may be doubted what exactly the noble and learned Lord did have in mind when he used the word "absolutely," but it was on a later passage that learned counsel mainly relied. "But in truth," said Lord Wright,[19] "the employer's obligation, as it has been defined by this "House, is personal to the employer, and one to be performed by "the employer per se or per alios. If I may take an analogy or "instance of a similar personal obligation, I note that the Carriage "of Goods by Sea Act, 1924, requires a shipowner to exercise "due diligence or to take reasonable care to provide a seaworthy

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[15] 1936 S.C. 883, 901.

[16] 1935 S.C. 681.

[17] [1938] A.C. 57.

[18] Ibid. 78.

[19] Ibid. 80.

"ship. The shipowner is almost certainly not an expert naval "architect, engineer, or stevedore. So far as I know it has "never been claimed that this obligation is fulfilled by the ship- "owner taking reasonable care to appoint a competent expert; "the shipowner is absolutely held to the fulfilment of the obliga- "tion. It is the obligation which is personal to him, and not "the performance." The appellant, fastening on these words, applies them by saying that here the employer was under an absolute personal obligation to supply proper tools to the workman which he could not fulfil by purchasing defective tools in the market. I shall endeavour to show that this is, in any case, an illegitimate application of what Lord Wright said. But it must be first observed that the analogy is an unfortunate one, for in the earlier case of *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *Peninsular & Oriental Steam Navigation Co.*,[20] the same learned judge had to construe the same section, and I venture to quote a substantial passage of his judgment because it is very apposite to the present case. After referring to the terms of the Act, the learned judge continued: "The obligation of the carrier "to exercise due diligence to make the ship fit is clearly not "limited to his personal diligence. The carrier . . . must act "by agents or servants . . . The question is: How wide is the "category of agents or servants with reference to the obligation "now being considered. It is contended by the plaintiffs that, "as the primary obligation on the carrier is to provide a seaworthy "ship, the carrier cannot delegate any part of that obligation so "as to relieve him of his personal liability, and he must accord- "ingly be accountable for lack of due diligence on the part of the "shipbuilders and their workmen, who are to be deemed to be "his agents, to make the ship seaworthy and fit, and that, there- "fore, the defendants must be held liable for the bad workman- "ship of which I have found the shipbuilder's men guilty . . . "I do not think that this contention is sound." My Lords, I think, with great respect, that when in *Wilsons'* case[21] the learned judge referred to the analogy of the Carriage of Goods by Sea Act, 1924, he did so with an imperfect recollection of what he had himself decided in the earlier case. And, much as I distrust analogies, I would add that there is a striking resemblance between the shipowner who is held not to be liable for the bad workmanship, undiscoverable by him, of the shipbuilder's employees and the employer who claims not to be liable for the bad workmanship, equally undiscoverable, of the employees of the manufacturer who supplied at second hand the tools with which he has provided his workman.

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[20] [1927] 2 K.B. 456, 460; 43 T.L.R. 675.

[21] [1938] A.C. 57.

I turn, then, to Lord Maugham. Again I must be allowed to quote at length, for it is almost entirely upon the authority of this case that the appellant relies. "It has already been pointed "out," said Lord Maugham,[22] "that the employers' liability is "discharged by the exercise of due care and skill; and I may be "allowed to point out that it is this circumstance which has led "on occasion to a misapprehension of the true position. An "illustration will demonstrate the mistake. Suppose some new "machinery is necessary in a factory, and the employer is absent "or completely unskilled in such things. He necessarily leaves "the matter to a manager, let us suppose a highly skilled "person, who, however, is negligent in this case. An accident "follows, due to a defect in the machine. If the liability of the "employer is stated as being an obligation to use his best "endeavours to supply and instal good machinery, it may well be "said on his behalf that he left the matter to a highly skilled "man, and it may be asked with force, what more could he do? I "should reply, nothing; but I should add that the premise is incor-"rect. The possessive pronoun 'his' is that which leads to the "error. The proposition would be more correctly stated to be that "his duty is to supply and instal proper machinery so far as care "and skill can secure this result. He can, and often he must, "perform this duty by the employment of an agent who acts on "his behalf; but he then remains liable to the employees unless "the agent has himself used due care and skill in carrying out the "employers' duty." My Lords, it is not necessary to read further. This is the passage on which reliance was placed as indicating that, if the proposition was properly stated, the employer was liable for want of skill and care on the part of anyone in the long chain from manufacture of the tool to its use by a workman. I am satisfied that Lord Maugham meant no such thing, and I find this a convenient place to explain what appears to me the fundamental fallacy in the argument. As I have tried to show, the contention, as stated in its first form, that the employer is liable for the acts of himself, his servants and agents and, subject to whatever limitations might be thought fit, independent contractors, could not lead to success in this action: for the manufacturer could not by any legitimate use of language be considered the servant or agent of, or an independent contractor with, the employer who buys his manufactures in the market. It was then sought to reach the same result by a different road. The employer, it was said, was under a duty to take reasonable care to supply his workmen with proper plant and machinery. It was assumed that this included tools such as drifts, and I, too, will, without deciding it, assume it. It was then said that the employer could not escape responsibility by employing a third party, however expert, to do his duty for him. So far, so good. That is what Lord Maugham said, and I agree. But then comes the next step—but I would rather call it a jump, and a jump that would unhorse any rider. Therefore, it was said, the employer is responsible for the defect in goods that he buys in the market, if it can be shown that that defect was due to the want of skill or care on the part of anyone who was concerned in its manufacture. But, my Lords, by what use or misuse of language can the manufacturer be said to be a person to whom the employer delegated a duty which it was for him to perform? How can it be said that it was as the delegate or agent of the employer that the manufacturer failed to exhibit due skill and care? It is, to my mind, clear that he cannot and equally clear that Lord Maugham was not contemplating such a case nor using language which was apt to cover it.

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[22] [1938] A.C. 57, 87–88.

I would now refer to *Donnelly* v. *Glasgow Corporation.*[23] In that case the plaintiffs, the conductor and driver of an omnibus belonging to the defendant corporation, suffered personal injuries through an accident which was due to a defect in the chassis of the omnibus. To their claim for damages the corporation pleaded that the defect was a defect of design for the non-discovery of which they could not be blamed, as they relied and were entitled to rely on the manufacturers and they were not responsible for any lack of care or skill on the part of the latter. This plea was rejected by the Lord Justice-Clerk. The want of care or skill was in that case one step nearer to the employer since there was no intervening supplier, and I note that the learned judge said that, if the position in that case had been that the Corporation had been able to say that neither they nor their suppliers could have discovered the defect by means of any reasonable inspection, the defence would be relevant. But, even so, I cannot accept the Lord Justice-Clerk's reasoning as correct. He summed it up in the words[24]: " The supplier and the master are as one." With the greatest respect, this broad generalisation goes too far, for the reasons I have tried to explain.

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[23] 1953 S.C. 107.

[24] 1953 S.C. 107, 122.

The case last cited and particularly the words that I have quoted lead me to a point, not indeed necessary to the decision of this appeal, but useful as an illustration of my theme. It was said that an employer might, instead of purchasing tools of a standard design, either from the manufacturer direct or in the market, order them to be made to his own design. If he did so and if they were defective and an accident resulted, it was clear (so the argument ran) that he would be responsible. I agree that he would, if the fault lay in the design and was due to lack of reasonable care or skill on his part. There is no reason why he should not. A more difficult question would arise if the defect was not due to any fault in design (for which the employer was responsible) but to carelessness in workmanship. But that is a far cry from the present case, and recognising, as I do, that in this area of the law there is a borderline of difficult cases, I do not propose to say more than I need. I must, however, refer, since I mentioned it some time since, to a case tried by Finnemore J. at Chester Assizes. No authority having been cited to him, he said[25]: " Employers have to act as reasonable people, they have " to take reasonable care; but if they buy their tools from well-" known makers, such as the second defendants are, they are " entitled to assume that the tools will be proper for the purposes " for which both sides intended them to be used, and not require " daily, weekly or monthly inspection to see if in fact all is well." My Lords, a prolonged examination of the authorities could not have led him to a sounder conclusion.

As I have already said, a large number of authorities were cited to us, many of them relating to the liability of an employer, or more often of an occupier of land, for the default of an independent contractor. It may one day fall to the House to explain and, perhaps, to reconcile these cases. It is not the occasion for that task when the fault lies at the door of one who was not an " independent contractor," however wide a meaning may be given to those words.

One more thing I must say. It was at one time suggested—I do not use a more emphatic word, for learned counsel was rightly discreet in his approach—that the House should take into consideration the fact that possibly or even probably the employer would, but the workman would not, be covered by insurance, and for that reason should be the more ready to fasten upon the employer's liability for an accident due neither to his nor to the workman's carelessness. I will only say that this is not a consideration to which your Lordships should give any weight at all in your determination of the rights and obligations of the parties. The legislature has thought fit in some circumstances to impose an absolute obligation upon employers. The Factories Acts and the elaborate regulations made under them testify to the care with which the common law has been altered, adjusted and refined in order to give protection and compensation to the workman. It is not the function of a court of law to fasten upon the fortuitous circumstance of insurance to impose a greater burden on the employer than would otherwise lie upon him.

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[25] [1955] 1 W.L.R. 549, 551.

For these reasons, therefore, which I will sum up by saying that the claim was against reason, contrary to principle, and barely supported by authority, I would dismiss the appeal with costs.

LORD MORTON OF HENRYTON stated the facts and continued: My Lords, the plaintiff's action was tried by Ashworth J. That learned judge, having stated the history of the matter and the nature of the defect in the drift, found that the servants of the second defendants had been negligent in the heat treatment of the drift. He continued [26]: "The problem of liability must be "considered on the basis that the employers provided for their "employee, the plaintiff, a dangerous tool which had been negli-"gently made by the second defendants. I consider first the "question whether in these circumstances the employers are "liable. In the first place, it is clear that no negligence can be "attributed to any of the employers' own servants or agents. "The drift P.2 was apparently in good condition and no allega-"tion was or could be made that the employers' system of main-"tenance or inspection was at fault. Moreover, the employers "bought the drift from a reputable supplier and paid a reasonable "price for it. The problem arises in naked simplicity: are they "responsible to the plaintiff because the drift was negligently "manufactured by the second defendants?"

The learned judge felt constrained by authority to answer the question so posed in the affirmative. He then held that the second defendants were liable to the plaintiff because their servants were negligent in the manufacture of the drift, which was supplied by the second defendants to Messrs. Baldwin & Co.

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[26] [1957] 2 Q.B. 368, 373; [1957] 2 W.L.R. 247; [1957] 2 All E.R. 38.

Ltd. in a condition likely to cause danger to anyone using it. He continued [27]: "I also hold that no intermediate examination of "the drift between the time of the manufacture and the time "of its actual use was reasonably to be expected. It seems to "me wholly unreasonable to expect an employer to test a drift "for hardness before issuing it to his employee, and no other "examination would have revealed the danger existing in this "particular drift."

I pause to say that it is plain from the judgment of the learned judge that he did not attribute any negligence to the suppliers, Baldwin & Co. Ltd.

The result was that the learned judge gave judgment for the plaintiff against both defendants for £2,030 and costs. The first defendants only appealed from this judgment, and the Court of Appeal, by a majority (Parker and Pearce L.JJ., Jenkins L.J. dissenting) allowed the appeal, and directed judgment to be entered for the plaintiff against the second defendants only.

The plaintiff now appeals to this House, and the question is whether he, having recovered judgment for £2,030 against the makers of the defective tool, can get judgment against his employers, who were in no way guilty of negligence, either by themselves or by their servants or agents. Ashworth J. and Jenkins L.J. felt themselves constrained by authority to hold the first defendants liable, but, in my opinion, there is no authority which constrains your Lordships to arrive at such a result.

At common law a master owes a general duty to his servants to take reasonable care for their safety. The duty, so far as it relates to the providing of appliances for the use of the servants, was defined by Lord Herschell, in terms which have often been quoted, in *Smith* v. *Charles Baker & Sons* [28]: " . . . the duty "of taking reasonable care to provide proper appliances, and to "maintain them in a proper condition . . ."

Counsel for the plaintiff contended that the obligation of the master is to take the degree of care thus defined per se or per alios; that the duty is absolute, and can only be discharged by the master if all reasonable care has in fact been taken to ensure the soundness of the tool. Applying this contention to the present case, they say truly that reasonable care was not in fact taken by the manufacturers, and contend that this fact is enough to make the employer liable. This contention appears to be, in effect, a contention that every master warrants the safety of every tool or other appliance provided by him for the use of his employees, and is therefore liable if any such appliance turns out to be unsound and an employee sustains injury in consequence. It matters not, say counsel, if the master and his servants or agents have taken all reasonable care to provide proper appliances; if a servant sustains injury because anyone, at any time, has been guilty of a want of reasonable care in regard to the manufacture, maintenance or inspection of the appliances, the master is liable.

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[27] [1957] 2 Q.B. 368, 380.

[28] [1891] A.C. 325, 362.

My Lords, in my opinion this contention goes far beyond anything warranted by principle or authority. It is well settled that if a master delegates to another this duty to take reasonable care, he is liable for injury caused through the negligence of that person because it is, in the eye of the law, his own negligence. This is sometimes called the doctrine of vicarious liability, but it has never been extended, by any decision binding on this House, to a case where the master has ordered a standard tool from a reputable supplier, and where, as Ashworth J. held, neither the master himself nor any one of his agents or servants has been guilty of any negligence. I would dismiss the appeal, and my conclusion would have been the same if the first defendants had bought this tool directly from the manufacturers, the second defendants. In that case also there would have been no delegation of the master's duty to take reasonable care.

I refrain from any detailed examination of the numerous cases cited in the course of the argument, because I gratefully accept the views expressed, in his survey of the authorities, by my noble and learned friend on the Woolsack. It is, I think, clear that if Ashworth J. and all the members of the Court of Appeal had felt themselves free to express similar views there would have been no difference of opinion between them.

LORD REID. My Lords, the facts of this case are very simple. The appellant was a maintenance fitter employed by the respondents. In the course of his work he was using in a proper manner a wedged-shaped tool called a drift which was supplied to him by the respondents: he was hammering it for the purpose of separating two pieces of metal. A chip flew off it and struck his eye so that he lost the sight of that eye. The drift was not safe for use because it was much too hard and brittle, and the cause of this was negligence of the manufacturers of the drift, or their servants. The respondents had bought the tool from a reputable merchant, who had in turn bought it from the manufacturers.

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The trial judge, Ashworth J., said [29]: "I also hold that no intermediate examination of the drift between the time of the manufacture and the time of its actual use was reasonably to be expected. It seems to me wholly unreasonable to expect an employer to test a drift for hardness before issuing it to his employee, and no other examination would have revealed the danger existing in this particular drift." This finding is not challenged by the appellant.

Accordingly, there was no negligence on the part of the respondents or any of their servants, including the appellant. The appellant's contention is that the respondents are liable to him in damages because of the negligence of the manufacturers or their servants. It is not said that the mere fact that the tool was unsafe and that this caused the accident is enough to make the respondents liable: but it is said that it is enough to make the respondents liable to show that the unsafe condition of the tool was the result of some person's negligence, whether or not there was any relation between the negligent person and the respondents. In some cases the negligent person might be the manufacturer who sold the article direct to the employer. In this case there was no contractual relation between the manufacturer and the respondents, because they bought the tool from a merchant. In other cases the negligent person might be the person who supplied parts or materials to the manufacturer, who in turn incorporated them in the article sold to the employer. In some cases the employer in buying the article might rely on the reputation of the manufacturer. In other cases he might rely on the reputation of the merchant from whom he bought. That is all said to be immaterial: all that matters is that some person somewhere in the chain was negligent, and that that negligence was the cause of the damage.

For this somewhat startling proposition *Wilsons & Clyde Coal Co. Ltd.* v. *English* [30] is said to be authority. Jenkins L.J., who dissented in the Court of Appeal, took that case as the starting point of the discussion and I shall do the same. In that case the accident was caused by failure to provide a reasonably safe system of working. This failure was not known to the board of directors but was known to their servants to whom they had delegated the management of the mine. The company sought to avoid liability on two grounds: first, that an owner not qualified to be a manager is prohibited by statute from taking part in the technical management of the mine, and they therefore had no control over and were not responsible for the actions which were negligent; and secondly, that their servants who were negligent were fellow servants of the victims of the accident and therefore the doctrine of common employment applied. Both these grounds of defence failed. There was no question of the company being liable for the negligence of some person who was not their servant.

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[29] [1957] 2 Q.B. 368, 380.

[30] [1938] A.C. 57.

I can find nothing in the speeches of Lord Thankerton or Lord Macmillan, or in the opinions in the Court of Session, which were approved in this House to suggest any intention to deal with the question whether an employer is in any way liable for negligence of any person who is not his servant. The word "agent" is frequently used, but that is because under the Coal Mines Act "agent" is the technical name of the chief servant of the owner, and the company's "agent" was one of their servants who was aware of the defective system. It is true that, in the passage quoted with approval from the opinion of the Lord Justice-Clerk in *Bain* v. *Fife Coal Co. Ltd.*,[31] he speaks of paramount duties being "entrusted by the master to others." But I think that the context makes it clear that by "others" he meant other servants of the employer.

The appellant relies on passages in the speeches of Lord Wright and Lord Maugham. Lord Wright, in dealing with the limitations of the doctrine of common employment, said[32]: "This House held that . . . the statutory duty was personal to "the employer, in this sense, that he was bound to perform it by "himself or by his servants. The same principle, in my opinion, "applies to those fundamental obligations of a contract of "employment which lie outside the doctrine of common employ"ment, and for the performance of which employers are "absolutely responsible. When I use the word absolutely, I "do not mean that employers warrant the adequacy of plant, "or the competence of fellow-employees, or the propriety of the "system of work. The obligation is fulfilled by the exercise of "due care and skill." Then he continued the discussion of common employment. So far I can see no sign that Lord Wright had any intention of dealing with an employer's liability for negligence of persons who are not his servants. Indeed, in the first sentence which I have quoted he says expressly that a duty "personal to the employer" must be performed "by himself or "by his servants."

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[31] 1935 S.C. 681, 693.

[32] [1938] A.C. 57, 78.

The first passage relied on by the appellant begins[33]: "But in "truth the employer's obligation, as it has been defined by this "House, is personal to the employer, and one to be performed by "the employer per se or per alios." Unless he has changed the meaning of "personal to the employer" in the course of two pages, "per alios" here must mean "by his servants." Then follows one of the passages which cause difficulty: "If I may "take an analogy or instance of a similar personal obligation, I "note that the Carriage of Goods by Sea Act, 1924, requires a "shipowner to exercise due diligence or to take reasonable care "to provide a seaworthy ship. The shipowner is almost certainly "not an expert naval architect, engineer, or stevedore. So far as "I know it has never been claimed that this obligation is fulfilled "by the shipowner taking reasonable care to appoint a competent "expert; the shipowner is absolutely held to the fulfilment of the "obligation. It is the obligation which is personal to him, and "not the performance."

In the passage which I quoted earlier Lord Wright explained what he meant by "personal obligation" and "absolutely." I do not think that he has changed those meanings here. He was concerned to meet the argument that the owner's obligation is fulfilled merely by delegation to a skilled servant whom he has neither the knowledge nor the power to supervise or control. In choosing this analogy I think that he must have had in mind his own carefully reasoned judgment in *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *Peninsular & Oriental Steam Navigation Co.*,[34] and, reading the words "personal obligation" and "absolutely" in the peculiar sense which he gives to them in his speech in *Wilsons & Clyde*[35] I see no contradiction between this passage and that judgment.

The relevant passages in *Angliss*[36] are too long to quote in full. I am not concerned with whether they are correct in law. I only use them to show what Lord Wright must have had in mind in making this reference to shipowners in *Wilsons & Clyde*.[37] Having pointed out that the carrier's obligation to exercise due diligence is clearly not limited to his personal diligence, and that he must act by agents or servants, which is the phrase employed in the Act, he said[38]: "The question is: How wide is the "category of agents or servants with reference to the obligation "now being considered. It is contended by the plaintiffs that,

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[33] [1938] A.C. 57, 80–81.
[34] [1927] 2 K.B. 456.
[35] [1938] A.C. 57.
[36] [1927] 2 K.B. 456.
[37] [1938] A.C. 57.
[38] [1927] 2 K.B. 456, 460–461.

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" as the primary obligation on the carrier is to provide a sea-" worthy ship, the carrier cannot delegate any part of that " obligation so as to relieve him of his personal liability, and he " must accordingly be accountable for lack of due diligence on " the part of the shipbuilders and their workmen, who are to be " deemed to be his agents, to make the ship seaworthy and fit, " and that, therefore, the defendants must be held liable for the " bad workmanship of which I have found the shipbuilder's men " guilty . . . I do not think that this contention is sound . . . " The carrier may not be the owner of the ship, but merely the " charterer; he may not have contracted for the building of " the ship, but merely have purchased her, possibly years after " she has been built. In the two latter cases the builders and " their men cannot possibly be deemed to have been the agents or " servants of the carrier and it is illogical that there should be " such difference in the carrier's obligations merely because he has " bought the ship by the method of contracting with the builders " to build it for him." Lord Wright then pointed out that if the carrier were liable for the bad workmanship of the builders he might equally be liable for bad workmanship of sub-contractors or those who supply special articles, " which would involve an almost " unlimited retrogression." Then he states his conclusion [39]: " He is to be liable for all such duties as appertain to a prudent " and careful carrier acting as such by the servants and agents in " his employment . . . But I do not think in any case that the " carrier can be held guilty of want of due diligence simply be-" cause the builders' employees have put in some bad work which, " though concealed, renders the vessel unfit." Lord Wright's reference in the passage in *Wilsons & Clyde* [40] to naval architect, engineer, or stevedore links up with a passage in *Angliss* [41] which deals with this matter and concludes: " Again, the need of repair-" ing a ship may cast on the carrier a special duty to see, as far as " reasonably possible, by special advisers for whom he is person-" ally responsible, that the repairs adequately make good the " defects."

The rest of Lord Wright's speech confirms me in my view that he had in mind what he had said in *Angliss*.[42] He continues to use the expression " servants and agents." He says [43]: " not " a warranty, but a duty to exercise (by himself and his servants " and agents) all reasonable care." And later he says [44]: " What

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[39] [1927] 2 K.B. 456, 461–462.

[40] [1938] A.C. 57, 81.

[41] [1927] 2 K.B. 456, 462.

[42] [1927] 2 K.B. 456.

[43] [1938] A.C. 57, 81.

[44] Ibid. 83–84.

"is the extent of the duty attaching to the employer? Such a "duty is the employer's personal duty, whether he performs or "can perform it himself, or whether he does not perform it or "cannot perform it save by servants or agents. A failure to "perform such a duty is the employer's personal negligence." At the end of his speech he says that the true rules of law on the subject have been stated by the Lord President and the majority of the Court of Session, and these opinions are in line with what I believe that Lord Wright meant by the passages which I have quoted.

Lord Wright had the nature of the vicarious liability of a shipowner sufficiently in mind to enable him to select this as an appropriate analogy to the vicarious liability of an employer to his servant, and it seems to me impossible that he could at the same time have forgotten his judgment in *Angliss*,[45] and equally impossible that he would have said no more than he did in *Wilsons & Clyde*[46] if he had come to think that his judgment in *Angliss*[47] was wrong. He certainly thought that a master (or a shipowner) would in some cases be vicariously liable for the negligence of a person who was not in law his servant. But he thought that a shipowner would not be vicariously liable for the shipbuilder's negligence: and by parity of reasoning he must have taken the same view about a master's liability in respect of plant which he had purchased. I cannot avoid the conclusion that, if the facts of the present case had been put before him in 1938, he would have decided in favour of the present respondents.

I find Lord Maugham's speech rather more difficult to interpret. Having agreed with the other opinions, he only set out, as he says, to add a few observations, and it would not appear that he intended to lay down some new doctrine. In the first half of his speech he was clearly only dealing with the negligence of a fellow servant. Then there comes the passage which gives rise to difficulty[48]: "It has already been pointed out that the employers' "liability is discharged by the exercise of due care and skill; and I "may be allowed to point out that it is this circumstance which "has led on occasion to a misapprehension of the true position. "An illustration will demonstrate the mistake. Suppose some "new machinery is necessary in a factory, and the employer is "absent or completely unskilled in such things. He necessarily "leaves the matter to a manager, let us suppose a highly skilled

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[45] [1927] 2 K.B. 456.
[46] [1938] A.C. 57.
[47] [1927] 2 K.B. 456.
[48] [1938] A.C. 57, 87–88.

" person, who, however, is negligent in this case. An accident " follows, due to a defect in the machine. If the liability of the " employer is stated as being an obligation to use his best " endeavours to supply and instal good machinery, it may well " be said on his behalf that he left the matter to a highly skilled " man, and it may be asked with force, what more could he do? " I should reply, nothing; but I should add that the premise is " incorrect. The possessive pronoun ' his ' is that which leads to " the error. The proposition would be more correctly stated to " be that his duty is to supply and instal proper machinery so far " as care and skill can secure this result. He can, and often he " must, perform this duty by the employment of an agent who " acts on his behalf; but he then remains liable to the employees " unless the agent has himself used due care and skill in carrying " out the employer's duty. This has sometimes been expressed " by saying that the duty is personal to the employer; but the " adjective if unexplained is apt to mislead, like the word " ' absolute ' and the word ' delegate.' The employer can, of " course, and frequently must delegate the performance of any " of his duties to skilled agents; but it would need an altogether " new implied term in the contract between employer and " employee before a court could properly hold that this delegation " has the result of freeing the employer from his liability. This " becomes apparent if we imagine the contract between employer " and workman to be written out in full with all the implied " clauses. There would be, for the reasons given by the Lord " Justice-Clerk in *Bain* v. *Fife Coal Co. Ltd.*,[49] and by your " Lordships, no clause to the effect that the employer was to be " freed from his special obligations to the workmen if he delegated " them to an agent; and in the absence of such a clause the " employer would plainly remain liable if the agent was guilty " of not using proper care and skill, since in the contract law of " Scotland as in England it is impossible to get rid of a liability " towards the other party to the contract without the consent of " that party."

The beginning of this passage, " It has already been pointed " out . . . ," must refer to the exercise of due care and skill by servants of the employer because that is all that he had already dealt with. Then his illustration deals with a manager, " let us " suppose a highly skilled person." Again he is dealing with a servant. Then he takes up the argument for the employer:

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[49] 1935 S.C. 681.

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" . . . he left the matter to a highly skilled man, and it may be "asked with force, what more could he do?" He still appears to be referring to the manager. Then comes the sentence so often taken out of its context and quoted alone: "The proposition "would be more correctly stated to be that his duty is to supply "and instal proper machinery so far as care and skill can secure "this result." He may have meant to include care and skill by everyone concerned, including the manufacturer, but that does not seem to me very likely because in the very next sentence he speaks of performing the duty by an agent who acts on the master's behalf, and thereafter he continues to speak of an agent. In using the term "agent" he may very well have meant a wider class than merely servants, but I can see no sign that he meant to go beyond persons who could properly be said to have been employed by the master to act on his behalf. It appears to me, therefore, to be at least doubtful whether Lord Maugham would have held an employer vicariously liable for the negligence of a manufacturer from whom he had bought plant or machinery.

Counsel for the appellant did not maintain that he was helped by the earlier English authorities, but he relied on certain Scottish authorities. The earliest was *Baird* v. *Addie*.[50] This case is of interest because it was decided before the rule of common employment was made part of the law of Scotland by this House in 1858 in *Bartonshill Coal Co.* v. *Reid*.[51] A miner was injured by an explosion due to defective ventilation: he sued his employers. They had made a contract with a person not their servant committing to him the care of the ventilation of the mine. The Lord Ordinary said[52]: "The great point of contention now made is, "that if the accident arose from negligence, it was from the "negligence of the contractor, for whom the defenders are not "responsible. . . . The primary obligation being imposed on "the coalmaster, it is clear that if he employs another to fulfil "it, he is liable for any failure or neglect in its fulfilment." He said that the contractor fell to be regarded in the light of a servant: the First Division took the same view. The Lord President (M'Neill) said[53]: "As to the inspection of the works, and the "notice to the pursuer of danger, it was clearly the duty of the "defenders to provide for that; and whoever they devolved it on, "was their servant, so far as concerns the pursuer." I think it may also be useful to quote from the opinion of Lord Ivory in *Nisbett* v. *William Dixon & Co.*[54] (a case relied on in *Baird* v. *Addie*[55]): "This is not the case of one who, being himself "employed in one trade, calls in the assistance of another, who "exercises a different trade, to do something which lies within "his calling. But it is the case of a party calling in another "to perform a subordinate part of his own trade. Everything "done by the party so called in is done in a subordinate "capacity—on the defenders' premises—under their control— "and in the execution of their own trade." The facts of this case were quite different, but this appears to have been a fuller statement of the principle followed in *Baird* v. *Addie*.[55]

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[50] (1854) 16 D. 490.

[51] (1858) 3 Macq.H.L. 266.

[52] (1854) 16 D. 490, 493n.

[53] Ibid. 494.

I attach some importance to this case because it shows the lines on which the law was developing before its development was interrupted by the introduction of the rule of common employment. That rule made it necessary to find another basis for the employer's liability, and this was found in the idea of duties personal to the employer. Now that the rule of common employment has gone, it seems to me that, in so far as we are not fettered by binding authorities, we should at least have in mind the older and less artificial line of development.

Next there are two cases in which Lord President Inglis expressed his opinion. In *Ovington* v. *M'Vicar*[56] a workman had been killed by the breaking of a chain. His employer paid damages in settlement of a claim by his relatives, and sought to recover the amount of the damages from the manufacturer of the chain, averring that he was not negligent but that the manufacturer was. Lord Justice-Clerk Inglis (as he then was) said[57]: "The case is put on this simple ground, that the machinery was "defective, and broke, and caused the death of Monaghan. If "that be so, if that is the only ground on which the claim is "made, then there was no liability on the part of the pursuers "to Monaghan's relatives. I entirely concur in the opinion "expressed by Lord Campbell L.C. in the case of *Weems* v. "*Mathieson*[58] that there is no warranty in such a case as this, "and that a defect of machinery, latent and unknown to the "master of a work, which he neither knows, nor is bound to know, "is not sufficient to ground a claim for damages at the instance "of a workman or his relatives. I think there must be some "culpa on the part of the master before he can be made

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[54] (1852) 14 D. 973, 981.

[55] 16 D. 490.

[56] (1864) 2 M. 1066.

[57] Ibid. 1072–1073.

[58] (1861) 4 Macq.H.L. 215.

"answerable for injuries sustained by his workmen." The other members of the Second Division gave similar reasons.

In *Wilson* v. *Merry & Cunningham*[59] the manager of a mine was negligent in having a scaffold erected across a shaft so as to impede ventilation. To avoid the rule of common employment it was argued that this was a case of providing defective apparatus. The Lord President said[60]: "That is not the nature "of this case. If such an argument were sound, that would bring "the case under the rule of a case which your Lordships very well "know, the case of *Weems* v. *Mathieson*,[61] which was decided "in this Division of the court, and afterwards in the House of "Lords, on appeal, and from the principle of which I am by no "means disposed to differ. I think that wherever the master of "a coal-pit, or of any other work, has occasion to purchase and "provide a machine or apparatus to be used by his workpeople, "or for the protection of his workpeople, he is liable for the "insufficiency of that machine or apparatus if it should turn out "to be insufficient. But this is not the providing of a machine "or apparatus at all." It was argued that this showed that the Lord President thought that a master is liable for defective plant whether he or his servants are negligent or not. I do not agree. He was merely making a passing reference to the law applicable in a state of affairs different from that in the case before him, and the scaffold, alleged to be apparatus provided by the master, was obviously defective in that it impeded ventilation. He was not dealing with anything in which there was a latent defect. I think that it is impossible to suppose that he intended to say something different from what he had said in *Ovington* v. *M'Vicar*[62] three years earlier, particularly as he refers to *Weems* v. *Mathieson*[63] in both cases. And in any event, if his words here are to be taken as a complete expression of the law, they mean absolute liability, a position which no one has ever supported. In this House in *Wilson* v. *Merry & Cunningham*[64] Lord Cairns L.C. referred to the master's duty "to furnish them with adequate materials and "resources for the work," and Lord Colonsay[65] referred to "the "failure to provide or supply the means of providing proper "machinery or materials." But for the same reasons I do not think that they intended to say that the master would be liable apart from negligence on the part of his servants, and again if their words were taken literally they would mean absolute liability.

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[59] (1867) 5 M. 807.
[60] Ibid. 811.
[61] 4 Macq.H.L. 215.
[62] 2 M. 1066.
[63] 4 Macq.H.L. 215.
[64] (1868) L.R. 1 Sc. & D. 326, 332.
[65] Ibid. 344.

I would also refer to another case of this period, *Paterson* v. *Wallace & Co.*,[66] where Lord Cranworth L.C. said: "It is the "master's duty to be careful that his servant is not induced to "work under a notion that tackle or machinery is staunch and "secure when in fact the master knows, or ought to know, that "it is not so. And if from any negligence in this respect damage "arise, the master is responsible."

Next there was cited the case of *M'Killop* v. *North British Railway Co.*,[67] when Lord M'Laren said with regard to Lord President Inglis's observation in *Wilson* v. *Merry & Cunningham*[68]: " . . . but his Lordship is careful to distinguish this "from the case of machinery or apparatus purchased by the "master and which is of faulty construction, because if injury "results, this he says is the fault of the master, whose business "it is to provide the apparatus." In *M'Killop's* case[69] there was no latent defect: the danger was obvious. I do not think that Lord M'Laren misunderstood the Lord President. By "the "fault of the master" I think he meant the fault of the master himself and not merely the fault of the negligent servant: he did not mean that providing machinery with a latent defect was the fault of the master.

The next case, *Macdonald* v. *Andrew Wyllie & Son*,[70] affords some support to the appellant. Builders engaged joiners to erect a scaffold. It was defective and it collapsed and one of the builders' workmen was injured. The defect could have been discovered by a skilled man. It was decided that the mere fact that the fault was that of an independent contractor did not absolve the employer from liability to his servant. Lord Moncreiff and the Lord Justice-Clerk thought that the employer would not be liable unless by the exercise of reasonable care he could have discovered the insufficiency. Lord Moncreiff said[71]: "In "order to render him liable there must be proof of fault or negli"gence on his part or those for whom he is responsible." But Lord Trayner went much further. He said[72]: "If a master buys "a machine, let us say, necessary for the execution of his work, "and gives it to his workman, it is the master's machine, not "the workman's or manufacturer's. If the machine turns out to

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[66] (1854) 1 Macq.H.L. 748, 751.
[67] (1890) 23 R. 768, 771.
[68] 5 M. 807.
[69] 23 R. 768.
[70] (1898) 1 F. 339.
[71] Ibid. 347.
[72] Ibid. 745.

"be faulty, defective, or otherwise insufficient, the master must "answer for it. He may have his relief against the maker or "manufacturer, but the injured workman has no claim against "the maker of the machine." Lord Young's opinion is not quite so clear: he does say [73]: "In the contract of master and servant, "apart from special stipulations to the contrary, it is implied that "the employer is responsible to his workmen for the condition "of the scaffolding which he has provided for them to work upon, "and that without any reference to the mode employed by him "to erect it." But in an earlier passage he says [73]: "The basis "of this action is that the defender was responsible to the pursuer "for the scaffolding being in a safe condition, of course excluding "the case of some latent defect not discoverable by reasonable "care." So the appellant can claim the support of Lord Trayner and possibly Lord Young, but the other two members of the Division are against him.

I shall also refer to two cases in which Lord Dunedin expressed his opinion. In *R. T. Wood & Co.* v. *Mackay* [74] he said, when Lord President: "The stevedore's liability in the action which "was raised against him rested on his want of inspection—that "is to say, his negligence, and his negligence alone. It did not "rest upon the ground that the rope was de facto unfit. It seems "to me that that proposition is abundantly clear from two circum- "stances. In the first place, it is clear from the undoubted law "of *Weems* v. *Mathieson*,[75] which is a House of Lords decision "and cannot be controverted. That case laid down in most clear "terms what has always been considered as law since then, that, "as between a workman and his employer, it is not enough for the "workman to say that the employer de facto supplied insufficient "material or an insufficient machine. He must show that in "doing so he was guilty of some negligence." And in *Ballard* v. *North British Railway Co.*,[76] a case regularly quoted on res ipsa loquitur, he said: "Thus, there is a class of cases dealing "with injury occurring to a servant owing to defective plant, "which he was obliged to use and which it was the duty of the "employer to supply. In such cases the fact of an accident may "easily be a fact from which you may infer that the plant was "defective, and it will then be upon the employer to show that "the defect was one against which he could not have guarded."

Down to this point there appears to be no case making an employer liable in respect merely of his plant having a latent defect, or in respect of the negligence of any person other than his servant or someone who in the circumstances can be treated as if he were his servant or subordinate. And apart from Lord Trayner's opinion and possibly Lord Young's, I have found no expression of opinion which appears to me to go beyond that. Apparently the principle for which the appellant now contends had never occurred to anyone. But there is a recent case directly in favour of the appellant.

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[73] 1 F. 339, 744.

[74] (1906) 8 F. 625, 633–634.

[75] 4 Macq.H.L. 215.

[76] 1923 S.C.(H.L.) 43, 53.

In *Donnelly* v. *Glasgow Corporation*[77] the driver and conductor of an omnibus were injured when it overturned as a result of the breaking of a front spring. The defenders admitted that the chassis was defective but averred that the defect was one which they could not have discovered by any reasonable examination, and that it was due to the negligence of the manufacturers from whom they bought the omnibus and on whose reputation they were entitled to rely, this type of chassis having proved satisfactory for many years. This defence was held to be irrelevant. The Lord Justice-Clerk, with whom Lord Mackay and Lord Patrick concurred, said[78]: "It is admitted by the corporation that the omnibus was defective and they aver that their "suppliers were responsible for the defective condition. But on "this branch of the law a master cannot escape liability to his "servant for defective plant by blaming his agents. The personal "responsibility which the law lays on the master in respect of "plant covers the activities of any person whom the master "employs to provide that plant. The supplier and the master are "as one. If then the supplier erred, the master is saddled with "the results of that error . . . If the position in the present case "had been that the corporation had been able to say that neither "they, nor their suppliers, could have discovered the defect by "means of any reasonable inspection, the defence would be "relevant. But, as I have already said, the corporation agree "that the defect was patent to their suppliers, and that in this "branch of the law means that it was patent to them." No authority is referred to but the Second Division were obviously accepting the view of the effect of *Wilsons & Clyde Coal Co. Ltd.* v. *English*[79] which has been prevalent in many quarters. If that view is now held to be wrong, as I think it should be, then this case cannot stand and must be overruled. It cannot stand with *Ovington* v. *M'Vicar.*[80]

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[77] 1953 S.C. 107.
[78] Ibid. 122.
[79] [1938] A.C. 57.
[80] 2 M. 1066.

I do not propose to examine the English authorities. I think that they lead to the same conclusion. But, even if it were open on the authorities to reach a conclusion in favour of the appellant, I would think such a conclusion to be wrong in principle. A master's duty to his servant with regard to the safety of plant supplied should, I think, be regarded as a part of the law of tort. Vicarious liability is well recognised and I see no difficulty in principle in extending vicarious liability beyond liability for those who are, strictly speaking, servants, but it would, I think, be going far beyond anything reasonable to extend it to cover a case where there was no relationship whatever between the master and the negligent person or his employer at the time when the negligence occurred. Then I take the other possible way of regarding the master's duty. It was common at one time to regard it as depending on the contract of employment, and, indeed, it was this view which was largely responsible for the invention of the rule of common employment. No doubt this view leaves the court much scope, but I think that it has always been recognised that an implied term must at least be reasonable. I could understand that it might be thought reasonable to make the master absolutely liable in certain cases. This has been done extensively by statute. But it seems to me wholly unreasonable to make the master's liability depend on the conduct of the servants of some person who may be a complete stranger.

Finally, I must notice the case of *Thomson* v. *Cremin*.[81] A stevedore's labourer was injured in the hold of a ship while discharging grain at Glasgow. Shifting-boards had been set up in Australia where the grain was loaded, and they had been supported by shores. The man's injury was caused by the fall of one of these shores. He sued both the shipowner and his employer. His action against his employer failed, but he succeeded against the shipowner on the ground that he was an invitee, and that the shipowner had failed in his duty as invitor. There is no necessary connection between the law of invitor and invitee and the law of master and servant, but in the passage chiefly relied on by the appellant Lord Wright referred to *Wilsons & Clyde Coal Co. Ltd.* v. *English*,[82] and Jenkins L.J. attached importance to *Thomson* v. *Cremin*[83] in his dissenting judgment in the present case.

The shifting-boards had been fixed by independent contractors in Australia, but the shipowner did not make this a ground of defence either in his pleadings or in his case submitted to this

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[81] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.

[82] [1938] A.C. 57.

[83] [1956] 1 W.L.R. 103n.

House. His case was (first) that there had been no negligence in fixing the boards, (secondly) that he was entitled to rely on a certificate of a government inspector in Australia that regulations had been complied with, and (thirdly) that the cause of the accident was negligence of the other defender, the stevedore.

The case has a curious history. It was decided by this House in 1941, but it was not reported at the time in either the Law Reports, Session Cases, the Scots Law Times or the All England Reports. Probably this was because Lord Simon L.C. said [84]: "The decision in this case turns almost entirely on questions of "fact," and Lord Porter said [85]: "The question to be considered "in the present case is, I think, one of fact rather than of law." It was reported in Lloyd's List Reports, but that may have been because it was of interest to those concerned with shipping. But later it was regarded in some quarters as laying down law of wide general importance.

It is the speech of Lord Wright that has attracted attention. He began by agreeing with the speech of the Lord Chancellor and said that he merely added a few supplementary observations on some general matters of principle which seemed to him to be involved. Then he said that the case fell within the general rule enunciated in *Indermaur* v. *Dames*.[86] There follows the passage chiefly relied on by the appellant [87]: "The duty of the invitor "towards the invitee is, in my opinion, a duty personal to the "former, in the sense that he does not get rid of the obligation by "entrusting its performance to independent contractors. It is "true that the invitor is not an insurer: he warrants, however, "that due care and skill to make the premises reasonably safe "for the invitee have been exercised, whether by himself, his "servants, or agents or by independent contractors whom he "employs to perform his duty. He does not fulfil the warranty "merely by leaving the work to contractors however reputable or "generally competent. His warranty is broken if they fail to "exercise the proper care and skill. This is only an instance of "the general rule which was stated by Lord Blackburn in another "connection in *Dalton* v. *Henry Angus & Co.*,[88] where he distinguished the case of what has been called the collateral negligence of a sub-contractor from their negligence in failing to per- "form a duty resting on the principal himself who 'cannot escape

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[84] [1956] 1 W.L.R. 103n., 107n.

[85] Ibid. 111n.

[86] (1866) L.R. 1 C.P. 274; (1867) L.R. 2 C.P. 311.

[87] [1956] 1 W.L.R. 103n., 110n.

[88] (1881) 6 App.Cas. 740, 829.

" 'from the responsibility attaching to him of seeing that duty " 'performed by delegating it to a contractor.' Lord Blackburn "again enunciated the same principle in *Hughes* v. *Percival*.[89] "More recently this House, again in a different context of fact, "applied this rule in *Wilsons & Clyde Coal Co. Ltd.* v. *English*.[90] "It is always a question of the extent of the duty incurred. In "the present case the invitee is not concerned with the course "which the invitor adopts by way of discharging the duty. He "is entitled when he comes on the invitor's premises to rely "on the warranty that the invitor's duty to him has been performed and to complain if he is injured because the duty has "not been properly performed."

That matter was also referred to by Lord Simon, who said [91]: "The shipowners' responsibility for the safety of the structure is "not indeed absolute, but, on the principle of *Indermaur* v. "*Dames*,[92] he owes to the invitee a duty of adequate care. If "adequate care was not exercised in fitting and securing the "shore, it would be no answer (as the appellant's counsel candidly "admitted) to say that the shipowner employed an independent "contractor at Fremantle to do the work."

I think that it is important to determine just what was decided by this House. The case was decided in favour of the stevedore because of the limited nature of a master's duty to see to the safety of a servant who is working on another person's premises. It was decided against the shipowner because negligence in securing the shore was found as a fact and the House negatived the only two defences on which he sought to rely if there was negligence which caused the accident—first, that he was entitled to rely on the certificate of a government inspector in Australia, and, secondly, that there would have been no danger if the more usual system of discharging grain had been in operation. The shipowner did not seek to avoid liability either in his pleading or in his case submitted to this House or in argument in this House because of the negligence being that of an independent contractor. So there could be no decision of this House on that matter: it was not submitted for decision. Therefore there could be no ratio decidendi, and any observations on that matter must in my view be regarded as obiter dicta. The distinction is not entirely technical, because a judge who has not heard a question argued out before him may be less likely to see the full implications and less likely to be entirely accurate in the language which he uses.

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[89] (1883) 8 App.Cas. 443, 446.

[90] [1938] A.C. 57.

[91] [1956] 1 W.L.R. 103n., 106n.

[92] L.R. 1 C.P. 274; L.R. 2 C.P. 311.

If the shipowner could not establish that the negligent workmanship of the independent contractor was such that it could not have been discovered by due diligence and inspection by himself or his servants, then it is easy to understand why his counsel admitted that he could not rely on the fact that the negligence was that of a contractor. The case would be clearly covered by the principle in *Indermaur* v. *Dames* [92] because he ought to have known about the negligent workmanship. On a cursory examination of the Record of the case I can find no clear indication whether due diligence would have discovered it. But Lord Porter at least must have thought that the shipowner's servants ought to have discovered it, because he said [93]: "To fulfil his contract "he requires stevedores to put out the cargo, and he must safe-"guard them against risks of which he knows or ought to know "and they do not." It was on that statement of the law that he decided the case.

But Lord Wright, having first said that the case fell within the general rule in *Indermaur* v. *Dames*,[94] went on to speak of a warranty by the invitor broken if independent contractors fail to exercise proper care and skill. Lord Wright's language appears to cover a case where a skilled tradesman of repute employed by a householder leaves negligent workmanship so concealed that no reasonable inspection by the householder or by a skilled man employed by him could discover it, and to mean that if an invitee were injured as a result of such negligence the invitor would be liable. I do not propose to discuss whether that can be reconciled with the famous passage from the judgment of Willes J. in *Indermaur* v. *Dames* [95] which has been so often approved. That question must remain to be decided in a case which requires it to be decided. It is sufficient in the present case to say that even if Lord Wright's language be taken literally and even if it were applied to the law of master and servant, it would not help the present appellant, because, using Lord Wright's own language in *Angliss*,[96] the manufacturers in this case "cannot possibly be "deemed to have been the agents or servants" of the respondents.

The conclusion to which I have come is that an employer, besides being liable to his servant for injury caused by the negligence of his own servants, is in some cases liable in respect of the

[92] L.R. 1 C.P. 274.

[93] [1956] 1 W.L.R. 103n., 114n.

[94] L.R. 1 C.P. 274; L.R. 2 C.P. 311.

[95] L.R. 1 C.P. 274, 287.

[96] [1927] 2 K.B. 456.

negligence of others. Where, then, is the line to be drawn? On the one hand it appears that an employer is liable for the negligence of an independent contractor whom he has engaged to carry out one of what have been described as his personal duties on his own premises and whose work might normally be done by the employer's own servant—at least if the negligent workmanship is discoverable by reasonable inspection. On the other hand, for the reasons which I have given, I am of opinion that he is not liable for the negligence of the manufacturer of an article which he has bought, provided that he has been careful to deal with a seller of repute and has made any inspection which a reasonable employer would make. That leaves a wide sphere regarding which it is unnecessary, and it would, I think, be undesirable, to express any opinion here. Various criteria have been suggested, and it must be left for the further development of the law to determine which is correct. In my judgment this appeal should be dismissed.

Lord Tucker. My Lords, I had written an opinion in which I endeavoured to analyse in some detail the speeches in the case of *Wilsons & Clyde Coal Co. Ltd.* v. *English*.[97] Since doing so I have read the opinions of my noble and learned friends, Viscount Simonds and Lord Reid, and it would be mere repetition if I were now to travel over the same ground. I will therefore content myself with expressing my agreement with their analyses of that case and their conclusions thereon, and merely add that I can find no justification for interpreting the language used in that case as any authority for extending the responsibility of the employer to cover acts of negligence on the part of anyone who may have constructed his machinery or some part thereof so as to cause a latent defect therein undiscoverable by the employer or his manager or other person entrusted by him with the task of selecting or ordering the required machinery. There is nothing in that case to warrant the inference that any such situation was ever under consideration, nor is there anything in the ratio decidendi (as distinct from some isolated passages taken out of their context) which points to this as a necessary and logical result of that decision.

My Lords, I do not think that the introduction of the independent contractor into this discussion presents any difficulty. It may well be that in some cases the employer may delegate the performance of his obligations in this sphere to someone who is more properly described as a contractor than a servant, but this will not affect the liability of the employer, he will be just as much liable for his negligence as for that of his servant. Such a contractor is entrusted by the employer with the performance of the employer's personal duty. But this does not mean that every person with whom the employer may have entered into some contractual relationship connected with the manufacture or supply of some machinery, appliance or tool which is ultimately used in his business automatically becomes a person entrusted by the employer with the performance of his common law duty. Still less can the negligence of some person with whom the employer has never been in contact contractually or otherwise, or of whom perhaps he has never even heard, be imputed to him.

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[97] [1938] A.C. 57.

My Lords, in the absence of some decision of this House binding upon me which compels me to accept what I regard as such a startling and unwarranted extension of the common law, I do not feel it is incumbent upon me to refer to or examine many of the numerous decisions in lower courts cited in the course of argument, none of which, with one exception, do more than contain some observations or dicta which lend some support to the contentions of the appellant. The exception is the case of *Donnelly* v. *Glasgow Corporation*,[98] which, for the reasons which have been already stated by your Lordships, I agree cannot stand and should be overruled.

I should, however, make reference to the decision of this House in the case of *Thomson* v. *Cremin*,[99] which was decided in 1941 but was not reported in the Law Reports until 1956. This was a case of invitor and invitee and I do not consider it necessary to embark on an inquiry into the differences between the duty of an invitor to invitee before the passing of the Occupiers Liability Act, 1957, and those of an employer to his employees, or to seek to reconcile all that was said in that case with other decisions in this House, but references were made by Lord Wright in his speech in that case by way of comparison to *Wilsons & Clyde Coal Co. Ltd.* v. *English* [100] for the purpose of illustrating the impossibility of the employer escaping liability for his common law obligations by entrusting the performance to servants or agents who act negligently. In so doing he referred to these obligations as based upon warranty, whereas in the *Clyde Coal Co.* case [100] he had rejected this as the basis of the duty. Here again

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[98] 1953 S.C. 107.

[99] [1956] 1 W.L.R. 103n.

[100] [1938] A.C. 57.

I do not think it is necessary for the decision of the present case to seek to reconcile these statements. I can find nothing in *Thomson* v. *Cremin* [101] to negative the interpretation which I have put upon the decision in the *Clyde Coal Co.* case.[102]

In conclusion I would wish to express my agreement with the majority judgments in the Court of Appeal, save that I would not base my decision upon the intervention of the suppliers between the manufacturers and the respondent company. In my view it would have made no difference if the drift had been purchased direct from the manufacturers, who could not be held to be persons entrusted by the respondent company with the performance of their common law duty towards their employees. This is not to say that in some cases an employer may not render himself liable to his servant for injury suffered by him by reason of a faulty specification prepared by the employer for the manufacturer or in cases where the manufactured article may require some inspection or test after delivery.

I derive some satisfaction from the fact that Finnemore J., unhampered by the citation of authority and in the light of common sense and the application of the common law as he understood it, arrived at the same result in *Mason* v. *Williams & Williams Ltd.*[103]

I would dismiss the appeal.

Lord Keith of Avonholm. My Lords, I agree, and would add only one or two observations. As my noble and learned friend on the Woolsack has pointed out, the manufacturer of the faulty drift can in no sense be regarded as an independent contractor entrusted by the plaintiff's employer with performance of the employer's duty to supply proper and adequate tools for use by his servants. I do not propose to enter into cases of independent contractors, of which there are a number, in which the person instructing the work has been held liable to third parties for negligence in performance of the work which the contractors were employed to do I would only say that the decision of this House in *Thomson* v. *Cremin* [104] has necessarily proceeded on the view that the shipowner was responsible for the condition of the shores fixed to the shifting-boards by the independent contractors in Australia. The contrary was not argued by the appellants' counsel, and it may be that the case is not a binding authority on this House on that point. But on that hypothesis the argument for the appellants in that case was that negligence of the independent contractors was not established, reliance being placed on evidence that the work was passed as satisfactory by a government inspector in Australia, and that the collapse of the shore in question was due to the negligent operations of the stevedores at the port of discharge. That was a case of invitor and invitee and, in my opinion, has little relevance to the present appeal.

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[101] [1956] 1 W.L.R. 103n.

[102] [1938] A.C. 57.

[103] [1955] 1 W.L.R. 549.

[104] [1956] 1 W.L.R. 103n.

Cases concerned with independent contractors did not mark the limit of the argument for the appellant in this appeal. The first reason stated in his case for reversing the order of the Court of Appeal is: " Because the duty owed by a master to " his servant to exercise due care and skill in the provision of " proper appliances for the use of the servant is not fulfilled " when the master obtains for the use of his servants from a " reputable supplier appliances which were in fact negligently " manufactured and defective and the first respondents [the " masters] were therefore guilty of a breach of this duty to the " appellant which caused injury to him." As amplified in argument his counsel stated this proposition thus: " The duty " of the master is to take reasonable care to provide proper " appliances. But the obligation to take that degree of care per " se or per alios is absolute. This obligation can only be discharged by the master if all reasonable care has been taken to " ensure the soundness of the tools. It is not enough that the " master may have entrusted to someone else the taking of all " reasonable care, *or has assumed that someone else had taken*, " or would take, all reasonable care to ensure the soundness of " the tools." The most material words for the purpose of the present case are those which I have italicised.

I can find no support for this submission in the case of *Wilsons & Clyde Coal Co. Ltd.* v. *English.*[105] I agree entirely with my noble and learned friends, Viscount Simonds and Lord Reid, in their analyses of the opinions in that case and could add nothing further. I would say something, however, about some earlier Scottish authority, if only because it seemed to be the keystone on which the appellant's submission rested. His counsel started with a paragraph from Glegg on Reparation (4th ed., p. 384; 3rd ed., p. 380) headed " Duty to Supply Adequate Plant not Satis- " fied by Purchase from Reputable Manufacturer," and which opened with the proposition: " The obligation upon a master " to use due care in providing sufficient plant is not satisfied

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[105] [1938] A.C. 57.

"by obtaining it from a merchant or manufacturer of good "repute." The text of the paragraph (without the heading which was introduced by the editor of the second and third editions) is the same as appeared in the second edition as written by Sheriff Glegg himself and published in 1903. The proposition professes to be supported by a passage from Lord President Inglis's opinion in *Wilson* v. *Merry & Cunningham*.[106] Its only other support would seem to be in the opinion of Lord Trayner in *Macdonald* v. *Andrew Wyllie & Son*.[107] My noble and learned friend, Lord Reid, has examined these and other Scottish cases and I do not wish to repeat what he has said, with which I agree. I would only add that what Lord President Inglis said was obiter and that I have great difficulty in thinking that he meant it to be taken in the absolute and unqualified sense in which it is being read. He seems to relate his words to the decision of this House in *Weems* v. *Mathieson*,[108] and a reference to that case shows very clearly that the decision turned on direct lack of care and attention by the master, or those for whom he was responsible, for the safety of his servant in the provision of appliances for suspending, and the manner of suspending, a heavy iron cylinder over the workman's head. Although the Lord President at one point uses the word "guarantee,"[109] I am not satisfied that he meant more than that the employer was under a duty to take reasonable means to satisfy himself so far as possible, by inspection or otherwise, that apparatus bought by, or provided for, him was safe for use by his workpeople. If he meant more it would be inconsistent, as my noble and learned friend has pointed out, with what the Lord President when Lord Justice-Clerk said in *Ovington* v. *M'Vicar*.[110] I would further observe that the paragraph relied on from Glegg does not seem to be entirely consistent with an earlier paragraph in the same work under the heading "Proof of Negligence" (2nd ed., p. 415; 3rd ed., p. 364; 4th ed., p. 370), which, in my opinion, more accurately states the true legal position. It is there stated: "The existence of a defect in "plant or appliances is not of itself evidence of fault on the part "of an owner, and is not a ground of liability. In order to recover "damages the injured person must show either that the owner "knew of the existence of the defect, or, what is more usual, that "he neglected to take reasonable precautions to find out whether "a defect existed." This passage is not confined to liability to strangers, as one of the cases cited in support of the proposition—*Gavin* v. *W. T. Rogers & Co.*[111]—was a case of master and servant.

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[106] 5 M. 807, 811.
[107] 1 F. 339.
[108] 4 Macq.H.L. 215.
[109] 5 M. 807, 811.
[110] 2 M. 1066.

This statement is, of course, apart from the question of negligence in the doing, or making, of something entrusted by an employer to an independent contractor, involving delegation of the performance of something which the employer is under a duty to do or provide for his workmen. The ambit of the decision in *Wilsons & Clyde Coal Co. Ltd.* v. *English* [112] did not extend beyond delegation of performance of an employer's duty to a servant. The Lord President in the Court of Session was careful to point that out, and Lord Fleming expressly reserved the question of the effect of delegation to an independent contractor. None of their Lordships in the House of Lords referred to delegation to an independent contractor, though Lord Wright may have had it in mind in relation not to a contract of service, but to the exercise of due diligence for the seaworthiness of a vessel in a contract of carriage by sea. In the cases of *W. Angliss & Co.*[113] and *Thomson* v. *Cremin* [114] Lord Wright took the opportunity, by way of illustration, of referring to cases in other relationships where an owner or occupier was unable to escape liability to a third party by delegating performance of some operation to an independent contractor. An observation, however, of Lord Wright in *W. Angliss & Co.*,[115] though not strictly relevant to this case (being made with reference to obligations of a carrier in a contract of carriage by sea), has, I think, some pertinence to the subject-matter of the present appeal. After pointing out that the carrier must act by servants and agents and posing the question,[116] " How wide is the category of agents or servants " with reference to the obligation now being considered? " he says with reference to the fault of the shipbuilders [117]: " The carrier " may not be the owner of the ship, but merely the charterer; he " may not have contracted for the building of the ship, but merely " have purchased her, possibly years after she has been built. In " the two latter cases the builders and their men cannot possibly " be deemed to have been the agents or servants of the carrier " and it is illogical that there should be such difference in the " carrier's obligations merely because he has bought the ship by " the method of contracting with the builders to build it for him.

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[111] (1889) 17 R. 206.
[112] [1938] A.C. 57.
[113] [1927] 2 K.B. 456.
[114] [1956] 1 W.L.R. 103n.
[115] [1927] 2 K.B. 456.
[116] Ibid. 460.
[117] Ibid. 461.

"In addition, if the carrier were held liable for the bad workmanship of the builders' men, he might equally be held liable for bad workmanship by the men employed by the various sub-contractors who supply material for the builders, such as steel-workers in furnaces and rolling mills, or who supply special articles such as castings, pumps or proprietary machines, which would involve an almost unlimited retrogression." These words were spoken with reference to a statutory liability of the carrier, but they are not so remote from the present case, where from one aspect the problem is to delimit a common law obligation of a master to exercise due diligence for the safety of his servants. Granted that in certain circumstances he may be responsible for the negligence of persons who may be described as independent contractors in the performance for him of his common law duties, where does his liability for negligence in the chain of performance end? The answer made by appellant's counsel is, Nowhere, for the only excuse which he accepts is latent defect arising without negligence in manufacture and which could not be discovered by the maker of the instrument in which the defect existed. This need not, and in the present case does not, involve negligence in a chain of delegation and sub-delegation, for here there was nothing but a purchase of a tool from a reputable wholesale supplier of tools. For all practical purposes the appellant's case involves that an employer is bound to warrant the sufficiency and safety of the tools used by his servants.

The only case that might support such a contention is *Donnelly* v. *Glasgow Corporation.*[118] The judgment in that case was not a judgment given after a trial but a decision on relevancy. The pursuer had averred (to paraphrase his averments) that the omnibus in question was of defective design, that its springs were liable to break, that this was known to the defenders, that steps in the shape of certain devices should have been taken to minimise the effects of such breakages, that such steps could have been taken by the defenders to minimise these effects and that they did nothing. He further and in any event averred a duty on the defenders "to provide an omnibus in which the pursuer was to carry out his duties as conductor which was safe and fit for him to work and travel in and which was properly constructed for this purpose." The defenders made averments, inter alia, that the accident was due to the fault of the makers of the omnibus. The Lord Ordinary held that these averments of the defenders were irrelevant and should not be admitted to probation and otherwise approved of an issue for jury trial. The defenders reclaimed against the Lord Ordinary's interlocutor and the court refused the reclaiming motion. The Second Division in refusing the reclaiming motion proceeded on a ground different from that taken by the Lord Ordinary. They held that the defenders had a duty to provide safe plant for their servant and could not escape liability for having provided defective plant by blaming the manufacturers of the omnibus. That the Lord Justice-Clerk (with whom Lord Patrick and Lord Mackay concurred) regarded the defenders as saddled with the fault of the manufacturers is clear from a passage where he says [119]: "If the position in the present "case had been that the corporation had been able to say that "neither they, nor their suppliers, could have discovered the "defect by means of any reasonable inspection, the defence would "be relevant. But, as I have already said, the corporation agree "that the defect was patent to their suppliers and that in this "branch of law means that it was patent to them." No authorities are discussed in the judgment, but it would seem from a reference to the authorities cited by the pursuer's counsel that he was relying on the passage in Glegg, on Lord President Inglis's dicta in *Wilson* v. *Merry & Cunningham*,[120] on *Macdonald* v. *Andrew Wyllie & Son* [121] and on *Wilsons & Clyde Coal Co. Ltd.* v. *English.*[122] Except for the statement in Glegg which, I consider, is vouched by inadequate authority I can find no support for the judgment in *Donnelly.*[123] That case was, in my opinion, on the point in issue wrongly decided. The duty of a master in supplying a servant with plant or material cannot, in my opinion, be placed higher than a duty to exercise reasonable care to see that the plant or material is safe for the purpose for which it is intended and he cannot be liable, except in a proper case of delegated performance, for the negligence of someone other than himself in the provision of that plant or material. I find it unnecessary to consider whether that liability can extend further than one remove in a chain of delegation. Purchase by a master from a wholesale or retail merchant, without more, is not, in my opinion, an instance of delegation. It is performance by the master himself. Casual references may no doubt be found among the authorities to a duty by a master to supply safe plant and material for his servant. These, I think, will be found to be

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[118] 1953 S.C. 107.

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[119] 1953 S.C. 107, 122.

[120] 5 M. 807.

[121] 1 F. 339.

[122] [1938] A.C. 57.

[123] 1953 S.C. 107.

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merely shorthand phrases, the fuller content of which may be gathered from the context. I may say, "I have a duty not to "run over anyone on the street" when I mean, "I have a duty "to exercise reasonable care not to run over anyone on the "street."

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *W. H. Thompson; G. P. Rugg & Co.*

F. C.

[HOUSE OF LORDS.]

H. L. (E.)*

1959
Jan. 19, 22.

DE DEMKO . . . . APPELLANT;

AND

HOME SECRETARY AND OTHERS . . . RESPONDENTS.

Court of Appeal—Jurisdiction—Criminal cause or matter—Fugitive offender—Appeal against refusal to discharge—Jurisdiction as "superior court"—Whether appellate or original—Fugitive Offenders Act, 1881 (44 *&* 45 *Vict. c.* 69), *ss.* 10, 39—*Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31.

An application for a writ of habeas corpus and an application for an order granting relief pursuant to section 10 of the Fugitive Offenders Act, 1881,[1] were both refused by the Divisional Court of the Queen's Bench Division, and the applicant appealed against the refusal of the order under the Act of 1881:—

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* *Present*: LORD REID, LORD GODDARD, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD BIRKETT.

[1] Fugitive Offenders Act, 1881, s. 10: "Where it is made to appear "to a superior court that by reason "of the trivial nature of the case, or "by reason of the application for the "return of a fugitive not being made "in good faith in the interests of "justice or otherwise, it would, "having regard to the distance, to "the facilities for communication, and "to all the circumstances of the case, "be unjust or oppressive or too severe "a punishment to return the fugitive "either at all or until the expiration "of a certain period, such court may "discharge the fugitive, either abso- "lutely or on bail, or order that he "shall not be returned until after the "expiration of the period named in "the order, or may make such other "order in the premises as to the court "seems just."

S. 39: "The expression 'superior "'court' means: (1) In England, "Her Majesty's Court of Appeal and "High Court of Justice; and (2) In "Scotland, the High Court of Justici- "ary . . ."

Held, that as in habeas corpus proceedings the Court of Appeal had no appellate jurisdiction in cases involving a criminal cause or matter, so under the Fugitive Offenders Act, 1881, it had no such jurisdiction; the jurisdiction conferred by sections 10 and 39 of the Act of 1881 was original and not appellate and, accordingly, the court could not entertain the appeal.

Rex v. *Governor of Brixton Prison, Ex parte Savarkar* [1910] 2 K.B. 1056; 26 T.L.R. 561 (followed in *In re Henderson* [1950] 1 All E.R. 283) approved.

Decision of the Court of Appeal, sub nom. *Reg.* v. *Governor of Brixton Prison, Ex parte de Demko* [1959] 1 Q.B. 268; [1958] 3 W.L.R. 624; [1958] 3 All E.R. 360 affirmed.

Appeal from the Court of Appeal (Lord Evershed M.R., Sellers and Pearce L.JJ.).

This was an appeal from an order and decision of the Court of Appeal dated October 7, 1958, whereby it was held that the court had no jurisdiction to entertain an appeal from an order of the Divisional Court of the Queen's Bench Division of the High Court of Justice refusing relief under section 10 of the Fugitive Offenders Act, 1881, to the appellant, Baron Kalman de Demko. The decision of the Court of Appeal was given on a preliminary objection taken by the Solicitor-General on behalf of the two first-named respondents, the Home Secretary and the Governor of Brixton Prison. The appellant's appeal to the Court of Appeal on the merits was never heard. The present appeal was confined to the issues raised by the preliminary objection.

The appellant was arrested on February 19, 1958, on various charges of fraud and theft alleged to have been committed in the Union of South Africa in or before June, 1951. He was brought before the Chief Magistrate for the Metropolis (Sir Laurence Dunne) sitting at the Bow Street Magistrates' Court, "as provided by the Fugitive Offenders Act, 1881, to show cause why "he should not be returned to the said Dominion in manner "provided by the said Act, on the ground of his being accused of "the commission of the following offence within the jurisdiction "of the said Dominion" (quoting from the order of the Chief Magistrate). The material offence was described as "Theft: "Converting to his own use a loan of £6,500 from" a certain Mrs. Smith. The third respondent, the High Commissioner of the Union of South Africa, having elected to proceed on three out of 18 charges originally preferred against the appellant, the magistrate, in accordance with the provisions of section 5 of the Fugitive Offenders Act, 1881, found one of these three charges to give strong and probable cause to believe in the appellant's guilt. The order made was that the appellant should be kept in custody until delivered pursuant to the provisions of the Fugitive Offenders Act.

The appellant made an application under section 10 of that Act and also an application for leave to issue a writ of habeas corpus. These applications were heard by a Divisional Court on July 14, 1958.

Devlin J. said, in delivering the judgment of the court: "The "matter has therefore been argued before us on the basis that it "would be unjust or oppressive for us to order him to return to "stand his trial, and the point has been made that these events "and this particular charge occurred seven years ago, and that "the lapse of time would make it unjust or oppressive that he "should now have to go to South Africa to stand his trial. We "have heard argument on that on both sides. We have given "consideration to the matters which have been raised, and we are "not satisfied on the whole that it would be unjust or oppressive "to require the accused to stand his trial now on this matter." The application for a writ of habeas corpus was also refused.

The appellant then appealed to the Court of Appeal, and on behalf of the present respondents the preliminary objection was taken that the Court of Appeal had no jurisdiction to hear the appeal.

F. H. Lawton Q.C. and *P. A. W. Merriton* for the appellant. The application to the Divisional Court was admittedly in a criminal cause or matter. The question is whether the appellant, who asked for relief under section 10 of the Act of 1881, has any right of appeal against the refusal of that relief, and whether or not on the proper construction of section 10 the Court of Appeal has an original jurisdiction in matters under it.

Since 1910, when the Court of Appeal decided that it had original jurisdiction (*Rex* v. *Governor of Brixton Prison, Ex parte Savarkar* [2]), there have been occasions when applications have been made straight to that court. The last recorded instance was in 1950: *In re Henderson.*[3] The two relevant sections of the Act of 1881 are sections 10 and 39. In *Amand* v. *Home Secretary* [4] the House of Lords treated *Savarkar's* case [5] as a criminal cause or matter.

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[2] [1910] 2 K.B. 1056; 26 T.L.R. 561.

[3] [1950] 1 All E.R. 283.

[4] [1943] A.C. 147; 58 T.L.R. 382; [1942] 2 All E.R. 381.

[5] [1910] 2 K.B. 1056.

In the Court of Appeal the appellant addressed no argument to the court on habeas corpus and only dealt with relief under the Act.

Reliance is placed on the doubts expressed by Buckley L.J. in *Savarkar's* case [5] on the question whether the Court of Appeal had original jurisdiction. Despite the attitude which has developed over the years, in the Act of 1881 the specific reference by Parliament to the Court of Appeal must have meant the Court of Appeal exercising appellate jurisdiction. If the reference to the Court of Appeal meant that it was to exercise an original jurisdiction it would be the only instance of that court being given such a jurisdiction. As to the practice and procedure in criminal matters in the High Court and the Court of Appeal respectively at the passing of the Act of 1881, see section 71 of the Supreme Court of Judicature Act, 1873, and also section 69. The Apprehension of Offenders Act, 1843 (6 & 7 Vict. c. 34)—the predecessor of the Act of 1881—contained nothing equivalent to section 10, which is quite new and provides two grounds for discharging a fugitive, (1) by attacking the justification for the order, and (2) by attacking its justice, a much wider conception. No help is to be derived from the proceedings under the Extradition Act, 1870 (33 & 34 Vict. c. 52).

In the Act of 1881 the expression "superior court" is used not only in section 10 but also in several other places, for example, section 7 and section 19, which is the converse of section 10.

The ban on appeals "in any criminal cause or matter" is in section 31 of the Supreme Court of Judicature (Consolidation) Act, 1925, and is subject to the Act of 1881. The Act of 1881 cannot have been intended to confer an original jurisdiction on the Court of Appeal, a thing foreign to the whole conception of its jurisdiction under the Judicature Acts.

Section 26 (2) (*d*) of the Act of 1925 specifically dealt with the jurisdiction of the Court of Appeal and conferred on it all jurisdiction conferred on it by any Act which came into force after the commencement of the Act of 1873 and not repealed by the Act of 1925. In sections 17 and 18 of the Act of 1873 the Court of Appeal is throughout envisaged as an appellate tribunal. The original of section 30 of the Act of 1925 is to be found in section 47 of the Act of 1873. Section 39 of the Act of 1881 goes out of its way to mention a court which has no jurisdiction except to hear appeals. Section 10 of that Act provides a new remedy quite different from habeas corpus; one can be claimed without the other.

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[5] [1910] 2 K.B. 1056.

The Court of Appeal has no original jurisdiction in habeas corpus: see *In re Carroll*[6] and *Savarkar's* case.[7] In the latter case the Court of Appeal was wrong in holding that it had original jurisdiction under the Act of 1881. *Amand* v. *Home Secretary*[8] does not affect the position either way in the present case. Section 39 of the Act of 1881 gives the Court of Appeal jurisdiction to hear this appeal.

Sir Harry Hylton-Foster Q.C., S.-G., Rodger Winn and *E. J. P. Cussen* for the first two respondents. The jurisdiction of the Court of Appeal to entertain an application under section 10 of the Act of 1881 is original only and neither appellate nor dual. No sensible reason can be suggested why this jurisdiction was given to it at all. Compare the pattern in the definitions of "superior courts" of the wording in section 5 of the British Law Ascertainment Act, 1859, and section 4 of the Foreign Law Ascertainment Act, 1861.

Either the words in section 39 were put in to confer original jurisdiction on the Court of Appeal or to override the prohibition on criminal appeals. Parliament would not have tried to achieve the latter by such ambiguous words. Therefore they can only be there to confer an original jurisdiction. This follows from section 47 of the Act of 1873.

Reliance is placed on the lack of correspondence between the definitions of "superior courts" in England, Scotland and Ireland in section 39.

Section 6 has no application to the present case.

J. C. Phipps, for the third respondent, did not argue.

F. H. Lawton Q.C. in reply. It is unthinkable that the legislature should suddenly have conferred on the Court of Appeal an original jurisdiction which it has in no other matter. That the court here has an appellate jurisdiction is confirmed by Lord Parker in *National Telephone Co. Ltd.* v. *Postmaster-General*.[9]

Their Lordships took time for consideration.

January 22. Lord Reid stated the facts and continued: The appellant did not maintain that he was entitled to appeal against the refusal to issue a writ of habeas corpus, recognising that

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[6] [1931] 1 K.B. 104, 106; 47 T.L.R. 20.

[7] [1910] 2 K.B. 1056, 1062–1063.

[8] [1943] A.C. 147, 155, 159–160.

[9] [1913] A.C. 546, 562; 29 T.L.R. 636.

Amand v. *Home Secretary*[1] was conclusive authority against the competency of such an application, but he maintained that he was entitled to appeal to the Court of Appeal against the dismissal of his application under section 10 of the Fugitive Offenders Act. The Court of Appeal on October 6, 1958, upheld the respondents' objection to the competency of that appeal, dismissed the appeal with costs, and granted leave to appeal to this House.

Section 31 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides: "(1) No appeal shall lie (*a*) except as provided by the Criminal Appeal Act, 1907, or this Act, from any "judgment of the High Court in any criminal cause or matter." If there was any jurisdiction in the Court of Appeal with regard to applications under section 10, it would seem to be saved by section 26 (2) (*d*) of the 1925 Act. I must therefore look at the earlier position.

There was a similar provision in section 47 of the Supreme Court of Judicature Act, 1873: " . . . no appeal shall lie from any "judgment of the said High Court in any criminal cause or "matter, save for some error of law apparent upon the "record . . ." The matter of error of law apparent upon the record does not now arise.

It is rightly admitted that the appellant's application to the Divisional Court was a criminal cause or matter and therefore the appeal to the Court of Appeal could only be competent if there is some statutory provision which excepts applications under section 10 from the general rule which denies jurisdiction to the Court of Appeal in any appeal relating to a criminal cause or matter.

The appellant argues that such a statutory provision is to be found in the Fugitive Offenders Act. Section 10 refers to a superior court, and the expression "superior court" is defined in section 39 as meaning: "(1) In England, Her Majesty's Court "of Appeal and High Court of Justice; and (2) In Scotland, the "High Court of Justiciary; and (3) In Ireland, Her Majesty's "Court of Appeal and Her Majesty's High Court of Justice at "Dublin; and (4) In a British possession, any court having in "that possession the like criminal jurisdiction to that which is "vested in the High Court of Justice in England, or such court "or judge as may be determined by any Act or ordinance of that "possession."

No one has yet been able to suggest even a plausible reason why the definition of "superior court" in section 39 should contain any reference to the Court of Appeal. The Court of Appeal was established by the Supreme Court of Judicature Act, 1873, and its jurisdiction arises entirely from statute. Its function is to exercise appellate jurisdiction in civil cases. It is true that there are one or two matters of comparatively small importance in which it has been given original jurisdiction, and there is at least one matter, criminal in form, in which it has been given appellate jurisdiction because that matter is civil in substance (section 27 of the Act of 1925). But there appears to be no matter at all comparable to the present in which it has any jurisdiction at all. Applications under section 10 are often combined with applications for leave to issue a writ of habeas corpus, and it is common ground that the Court of Appeal has no jurisdiction either original or appellate to deal with habeas corpus applications. But some meaning must be found for the reference to the Court of Appeal in section 39; it must be held to confer on that court jurisdiction of some kind, original or appellate, to deal with applications under section 10. To hold that the Court of Appeal is given original jurisdiction co-ordinate with that of the High Court does not create any great difficulty. It merely produces the somewhat odd result that an applicant under section 10 can choose whether to make his application to a Divisional Court or to the Court of Appeal. But to hold that this reference to the Court of Appeal confers an appellate jurisdiction would create much more difficulty. In the first place, it would entail a breach of the general rule clearly laid down in the Supreme Court of Judicature Act that the Court of Appeal has no appellate jurisdiction in a criminal cause or matter, and if it was intended that the Court of Appeal should have that jurisdiction, one would have expected the intention to be much more clearly stated. Secondly, it would mean that considerable delays would be made possible in a matter which otherwise could and should be speedily disposed of. And thirdly, it would mean that there would be a marked difference between the law in England and Ireland on the one hand, and the law in Scotland on the other, because it is quite clear that in Scotland there can be no appeal from the first order of the superior court there. Apart from authority, I would, therefore, say without hesitation that this reference to the Court of Appeal in section 39 of the Fugitive Offenders Act, 1881, must be held to confer on that court original, but not appellate, jurisdiction.

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[1] [1943] A.C. 147; 58 T.L.R. 382; [1942] 2 All E.R. 381.

When I turn to authority I find that this view is confirmed in *Rex* v. *Governor of Brixton Prison, Ex parte Savarkar.*[2] The applicant made application to the High Court for a writ of habeas corpus and he also founded on section 10 of the Fugitive Offenders Act. Although the court decided against him on both these matters, the order of the court only referred to the habeas corpus application. The Court of Appeal held that they had no jurisdiction to deal with the habeas corpus application, that the matter of section 10 not being mentioned in the order was not properly before them in the appeal, but that they had original jurisdiction to deal with an application under section 10, and that this matter was not res judicata because it was not dealt with in the lower court's order. An application was therefore made to the Court of Appeal under section 10. A preliminary objection to its competency was not upheld and the application was heard and dismissed.

Counsel for the appellant argued that *Savarkar's* case [2] was wrongly decided and he founded on a passage in the judgment of Buckley L.J.[3]: "There is one other point upon which I wish "to say a word. It is this: it would be another possible objection "to the original motion which, as the result of this judgment, we "are going to hear that, where the Act of 1881 refers to the "'Court of Appeal' as a 'superior court,' it means that court "sitting as a court of appeal. The learned Solicitor-General has "not thought fit to argue that point. I agree with what "Vaughan Williams L.J. has said to the effect that we must for "ourselves determine that point in order to hear this motion. "As my two brothers think that that point is to be resolved in "favour of our hearing the motion, of course that decides the "matter. For my own part, I have not heard the matter argued, "and will only say that I think it a question of very considerable "difficulty whether, when this Act speaks of the 'Court of "'Appeal,' it does not mean the Court of Appeal sitting as a "court of appeal. It is unnecessary for me to say more as to "this point, because the other members of the court do not think "that is the meaning." I do not think that it is necessary to make further citations from this case. For my part, I can only say that I think that the case was rightly decided, and in subsequent cases it has been accepted without question. In *In re Henderson* [4] an application under section 10 to the Court of Appeal was dealt with, without any question being raised as to the competency, and in *Amand's* case[5] reference was made to *Savarkar's* case[6] by both Lord Simon and Lord Wright. It is true that *Amand's* case[7] does not raise the precise point here, but it is obvious that *Savarkar's* case[8] was considered with some care. Lord Simon said[9]: "As regards the right to appeal, it has "been consistently held that there is no right of appeal from the "refusal of the writ in extradition proceedings (*Ex parte Woodhall*[10]) or in proceedings under the Fugitive Offenders Act, 1881 "(*Rex* v. *Governor of Brixton Prison, Ex parte Savarkar*[11]). It "will be observed that these two decisions, which I accept as "correct, involve the view that the matter in respect of which the "accused is in custody may be 'criminal' although he is not "charged with a breach of our own criminal law." Lord Wright twice referred to *Ex parte Savarkar*[11] without any indication of doubt on his part that the case had been well decided. I am, therefore, of opinion that the Court of Appeal reached a correct result in this case, and I move your Lordships to dismiss this appeal with costs.

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[2] [1910] 2 K.B. 1056; 26 T.L.R. 561.

[3] [1910] 2 K.B. 1056, 1079.

[4] [1950] 1 All E.R. 283.

LORD GODDARD. My Lords, I concur.

LORD TUCKER. My Lords, I agree.

LORD KEITH OF AVONHOLM. My Lords, I agree.

LORD BIRKETT. My Lords, I agree.

Appeal dismissed.

Solicitors: *Beach & Beach; Director of Public Prosecutions; Jaques & Co.*

F. C.

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[5] [1943] A.C. 147.
[6] [1910] 2 K.B. 1056.
[7] [1943] A.C. 147.
[8] [1910] 2 K.B. 1056.
[9] [1943] A.C. 147, 156.
[10] (1888) 20 Q.B.D. 832; 4 T.L.R. 515.
[11] [1910] 2 K.B. 1056.

[HOUSE OF LORDS.]

BALDWIN & FRANCIS LTD. . . . APPELLANTS; H. L. (E.)*

AND

PATENTS APPEAL TRIBUNAL AND OTHERS RESPONDENTS.

1959
March 16, 17, 18, 19;
May 14.

Crown Practice—Certiorari—Inferior tribunal—Patents Appeal Tribunal—Whether certiorari will lie to tribunal—Patents Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 87), *ss.* 9, 85 (1).

Patents—Appeal Tribunal—Jurisdiction—Whether amenable to certiorari.

Crown Practice—Certiorari—Error of law on face of record—Construction of technical terms—Evidence necessary to enable court to construe documents—Whether assessors may be appointed to assist court—Whether certiorari applicable—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 98.

Evidence—Construction of documents—Extrinsic evidence—Meaning of words—Technical terms.

The effect of sections 9 (3), 14 (4), 85 and 87 of the Patents Act, 1949, was that no appeal lay to the Court of Appeal from the decision of the Patents Appeal Tribunal in the present proceedings, that it was an inferior tribunal and that the only remedy of persons aggrieved by its decision was by way of an order of certiorari.

A company made an application for a patent, whereupon, on the publication of its specification, the owners of a prior dated patent opposed the application on the ground (inter alia) that its specification could not fairly describe the invention or method by which it was to be performed without referring to their prior dated patent, and that such a reference should be directed under section 9 of the Act. Both the patent applied for and the prior dated patent concerned improvements designed to prevent the reclosing of an electric circuit in which an earth fault had developed, until that fault was repaired.

In opposition proceedings under section 14, the superintending examiner, on behalf of the comptroller, decided that the later invention could not be performed without substantial risk of infringement of the prior dated patent, and, accordingly, there being no proposals for amending its specification, the superintending examiner, by a final decision, ordered that the patent applied for should be sealed with a reference to the prior dated patent.

On appeal, the Patents Appeal Tribunal reversed this decision. The owners of the prior dated patent applied for an order of certiorari on the ground that there was error of law appearing on the face of the record in that the tribunal had misconstrued the rival specifications or one of them:—

Held, that certiorari should not issue.

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* *Present*: LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER, LORD SOMERVELL OF HARROW and LORD DENNING.

Per Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Somervell of Harrow: Assuming (but not deciding) that the record on which the court was entitled to reach its conclusion included (as the appellants contended) the decision of the superintending examiner and the two specifications, as well as the decision of the tribunal, no error of law appeared on the face of the application.

Per Lord Denning: The documents formed part of the record and disclosed an error of law, so that this was a case in which certiorari might issue. Nevertheless, it should not issue because (1) the proper remedy for the appellants was to sue for infringement after the article had been made and (2), further, they could have pointed out the error to the tribunal so that it might have been corrected.

Per Lord Morton of Henryton and Lord Denning: Unless in a case where there is a dispute as to the meaning of relevant technical terms, when evidence must be called, the court may determine the meaning of such terms by consulting dictionaries or by the appointment of assessors under section 98 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Reg. v. *Medical Appeal Tribunal, Ex parte Gilmore* [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; [1957] 1 All E.R. 796 considered.

Decision of the Court of Appeal sub nom. *Reg.* v. *Patents Appeal Tribunal, Ex parte Baldwin & Francis Ltd.* [1959] 1 Q.B. 105; [1958] 2 W.L.R. 1010; [1958] 2 All E.R. 368 affirmed.

Appeal from the Court of Appeal (Jenkins, Parker and Pearce L.JJ.).

This was an appeal, by leave of the House of Lords, against a judgment of the Court of Appeal dated May 2, 1958, dismissing the appeal of the appellants, Baldwin & Francis Ltd., against a judgment of the Divisional Court of the Queen's Bench Division (Lord Goddard C.J. and Donovan J.) dated October 14, 1957, dismissing a motion for an order of certiorari to quash the order of the Patents Appeal Tribunal (Lloyd-Jacob J.), the first respondent, dated January 17, 1957, which reversed interim and final decisions of the superintending examiner (Mr. E. T. Vincent for the Comptroller-General of Patents, the second respondent) whereby in opposition proceedings under section 14 of the Patents Act, 1949, he ordered, pursuant to section 9 of the Act, the insertion in the specification of letters patent No. 703,630 of Anderson, Boyes & Co. Ltd., the fourth respondents, of a reference to the specification of letters patent No. 658,823 of the appellants (the petitioners in the opposition proceedings). Application for letters patent No. 703,630 was made by the fourth respondents and by Alexander Anderson, the third respondent.

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The facts stated in the opinion of Lord Morton of Henryton were as follows: The appellants were owners of a patent No. 658,823, the complete specification of which was entitled "improvements in and relating to earth leakage protection "systems for electric motors, cables and other apparatus." Those improvements were designed to prevent the reclosing of a circuit in which an earth fault had developed, until that fault had been repaired.

On November 22, 1950, the respondents made application for patent No. 703,630, the complete specification of which was filed on December 24, 1951, and published on February 10, 1954. The specification was entitled "improvements in or relating to protective systems for polyphase A.C. loads." The purpose of the invention in question was similarly to prevent the reclosing of an electrical circuit while an earth fault which had developed remained unrepaired.

Within the statutory period the appellants gave notice of opposition under section 14 (1) of the Patents Act, 1949, on a number of grounds, of which the only material one was that the complete specification did not sufficiently and fairly describe the invention or the method by which it was to be performed, under the terms of subsection (1) (*g*) of section 14. The appellants' contention was that the specification could not fairly describe the invention or the method by which it was to be performed without a reference being made to their patent No. 658,823, and that such a reference should be directed under section 9 of the Patents Act, 1949.

The reason for such a reference being directed by the Comptroller-General was that any member of the public proposing to make the apparatus described in the specification ought to be warned that in so doing he ran a substantial risk of infringing the prior patent mentioned in the reference.

By an interim decision dated June 15, 1956, the superintending examiner, on behalf of the comptroller, decided that the respondents' invention could not be performed without substantial risk of infringement of the appellants' patent. He rejected all other grounds of opposition, and allowed the respondents one month to submit proposals for amending their specification. No such proposals were forthcoming, and, accordingly, by a final decision dated August 31, 1956, he ordered that the patent applied for be sealed with a reference to the appellants' patent.

The respondents appealed from this decision to the Patents Appeal Tribunal and that tribunal reversed the order of the superintending examiner.

The appellants thereupon applied by motion to the Divisional Court of the Queen's Bench Division for an order of certiorari to bring up and quash the order of the Patents Appeal Tribunal on the ground that errors of law appeared on the face of the record. The alleged errors of law were set out in the statement by the appellants dated June 26, 1957, and included misconstruction by the tribunal of the relevant specifications.

The Divisional Court dismissed the motion. Lord Goddard C.J., after referring to sections 9 and 85 of the Patents Act, 1949, and to the rules made thereunder, said that it was obvious that Parliament and the Statutory Committees who had to make rules considered that matters relating to patents would be considered by experts; it was not intended that the Divisional Court should investigate difficult scientific questions. Lord Goddard pointed out that what the Patents Appeal Tribunal had to consider was whether there was a substantial risk that the respondents' patent infringed some other patent. The tribunal had come to the conclusion that on the evidence it could not find that there was such risk, and accordingly had allowed the appeal. Whether a patent could or could not be performed without substantial risk of infringement of some other claim was essentially a question of fact. Donovan J. delivered a concurring judgment.

The appellants appealed to the Court of Appeal, and that court (Jenkins, Parker and Pearce L.JJ.) dismissed the appeal.

Patrick Graham Q.C., *Anthony Cripps Q.C.* and *Mervyn Heald* for the appellant company. The Court of Appeal based itself on *Shore* v. *Wilson*,[1] but that is a case, not on certiorari, but on the admissibility of evidence. It has nothing to do with this case. Its correctness is not disputed. It is not against the appellants. The consequences of the court's decision would be that certiorari would not be available in law in any case where it was necessary for the court to understand the meaning of technical terms used, but not explained, in the record in order to appreciate that an error of law existed on the record.

There are two types of technical matter: (1) terms as to which there is a dispute and (2) background technical matters which are necessary for the understanding of the case, but as to which there is no dispute. In so far as technical fact is in dispute, that must be determined by the technical tribunal on evidence, and once there is a finding on it that cannot be reopened by certiorari. But the second class can be dealt with in several ways. The court can, for instance, send the record back to the inferior tribunal to ask for an explanation. See also sections 11 and 12 of the Tribunals and Inquiries Act, 1958, which might be rendered nugatory by this decision, since it would not be much use having such provisions in the case of tribunals concerned with technical matters if the court on certiorari cannot instruct itself on the meaning of the terms used. The Court of Appeal went wrong in failing to take account of the difference between these two types of technical matter. It is admitted that when there is a finding of the court on a material technical matter, the court and the parties are equally bound by that finding.

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[1] (1842) 9 Cl. & F. 355.

The relevant enactments are sections 4 (3) (*b*), 9 (1) (3), 14 (1) (*g*), (2) (4), 32 (1) (*h*), 85 (1) (7) (9) (10), 87 (1) and 101 of the Patents Act, 1949; rules 35 and 47 of the Patents Rules, 1949 (S.I. 1949, No. 2385); and rules 1, 4 and 7 of the Patents Appeal Tribunal Rules, 1950 (S.I. 1950, No. 392 (L.8)). It is to be noted that a hearing before the Patents Appeal Tribunal is not a rehearing, but an appeal. It is an inferior tribunal, not part of the High Court, and so is subject to certiorari: see *Reg.* v. *Patents Appeal Tribunal, Ex parte Champion Paper and Fibre Co.*[2] The effect of sections 85 and 87 of the Act is that no appeal lies in the present proceedings. In some cases the only way to make the record intelligible would be to include the evidence. Thus it must include at least the decision of the superintending examiner, the notice of appeal to the Patents Appeal Tribunal, the decision of that tribunal and the two relevant specifications.

Here the judgments of the Divisional Court are of little help because they assume that the question is essentially one of fact, whereas it is a mixed question of law and fact. By analogy, if one is asked whether such-and-such a statement can be safely published, the first question is one of law: whether it is capable of a defamatory meaning. Similarly, a question of infringement first involves reaching a correct construction of the claims of the specification alleged to have been infringed, so as to decide the scope of those claims. To speak of a " mixed question of law and " fact " means that there are two questions, one of law and one of fact. The Divisional Court did not appreciate that there was a legal point involved.

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[2] [1957] 1 W.L.R. 248; [1957] 1 All E.R. 227.

The Court of Appeal should have decided that the superintending examiner's decision was part of the record, and should have considered his explanations and findings which were not dissented from by Lloyd-Jacob J.

Certiorari is a writ of very broad application, but there grew up too narrow a view that the record meant merely the decision of the inferior tribunal. That is not so. It would be futile if one could not look at the superintending examiner's decision here, because it forms the whole basis of the matter: see *Rex* v. *Northumberland Compensation Appeal Tribunal*,[3] citing Blackstone. The record must contain at least the document which initiates the proceedings. Here it is the notice of appeal to the Patents Appeal Tribunal: see rules 1 and 2 of the Patents Appeal Tribunal Rules and Schedule I for the form. This comes within the broad words of Blackstone's Commentaries, 1768 ed., vol. 3, pp. 24–25. See also *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore*[4]; *Rex* v. *Warnford*[5] and *Williams* v. *Lord Bagot*.[6]

If the Court of Appeal in the present case are right, an inferior court could defeat certiorari by not putting into its record enough to make the case intelligible.

Rule 2 of the Patents Appeal Tribunal Rules makes it clear that the proceedings are an appeal to the tribunal. No further evidence is given (rule 7), unlike the practice at quarter sessions. *In re Kiashek*[7] shows that the hearing is not a hearing de novo. Contrast *Davies* v. *Price*.[8]

The decision of the superintending examiner must be held to be part of the record, and the House of Lords should hold itself to be bound by his findings of fact.

The court must construe the two specifications before it can decide whether there is a substantial risk of infringement, and the construction is a matter of law.

The next question is whether the record, including the decision of the superintending examiner, does show an error of law on its face. There is such an error of law because, on a reading of the tribunal's decision, it clearly misconstrued the specifications.

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[3] [1952] 1 K.B. 338, 351–352; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122.

[4] [1957] 1 Q.B. 574, 582; [1957] 2 W.L.R. 498; [1957] 1 All E.R. 796.

[5] (1825) 5 D. & R. 489, 490.

[6] (1824) 4 D. & R. 315.

[7] (1954) 71 R.P.C. 453, 454.

[8] [1958] 1 W.L.R. 434, 440–441; [1958] 1 All E.R. 671.

The matter must be looked at broadly. What was said at the end of the judgment of the Court of Appeal[9] may not be wrong, so far as it goes, but it is incomplete.

As to certiorari, see *Rex* v. *Northumberland Compensation Appeal Tribunal*,[10] which deals with the Summary Jurisdiction Act, 1848 (Jervis's Act), and the effect which it had in producing too narrow a view of certiorari. See also *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore*.[11] The Queen's Bench should always be vigilant to exercise its controlling powers by certiorari. It is an effective weapon to enforce the rule of law and protect the individual from any wrongful exercise of power by the executive or by a tribunal, and from the effect of an incorrect decision of law in tribunals where the decision may depend on a majority of non-lawyers. It has been used again and again for this very necessary purpose. Section 11 of the Tribunals and Inquiries Act, 1958, shows how the legislature has confirmed its authority. The Queen's Bench should never be astute to find a way of deposing itself from its exercise of control by means of this writ. There is no difference in principle between the court's duty in granting certiorari for errors of law and for excess of jurisdiction. Cases of excess of jurisdiction often depend on fact, but they may also involve a decision of a point of law. The decision on jurisdiction has in many cases in the past been described as collateral, that is, not part of what has to be decided if jurisdiction truly exists; in other cases the decision on jurisdiction is intrinsic, that is, part of what has actually to be decided. Parliament is always superior and can legislate as it likes. Jurisdiction depends on the construction of the Act setting up the particular inferior tribunal, and it may be clear from that construction that Parliament has restricted certiorari and has made the tribunal sole judge, so that in such a case certiorari will not lie. The true test is the construction of the Act, whether that inquiry is collateral or intrinsic to the merits. The test is the intention of Parliament in setting up the tribunal: see *Reg.* v. *Commissioners for the Special Purposes of the Income Tax*.[12]

For the purpose of informing itself as to the meaning of technical terms, the court may appoint assessors under section 98 of the Supreme Court of Judicature (Consolidation) Act, 1925. See also R.S.C., Ord. 36, r. 2, and Ord. 37A, r. 12. In respect of technical matters the record here is sufficient. But when the record is not sufficient in this respect it is the duty of the court to inform itself on the technical matters with the aid of a technical dictionary or by calling in an assessor. This case could, if necessary, be sent back to the superintending examiner for him to amplify his decision.

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[9] [1959] 1 Q.B. 105, 113.

[10] [1952] 1 K.B. 338, 349.

[11] [1957] 1 Q.B. 574, 585–586.

[12] (1888) 21 Q.B.D. 313, 319; 4 T.L.R. 636.

Reg. v. *Bolton* [13] is the basic authority on the question what is and what is not an excess of jurisdiction. It was cited in *Rex* v. *Nat Bell Liquors Ltd.*[14] From the cases it appears that where the question is one of jurisdiction the court can look at anything, whether in the record or on fresh affidavit, to see whether the inferior tribunal has or has not jurisdiction. If the facts are not clear from the record the court can send the case back to the inferior tribunal to get them clarified.

The question of alleged error of law is equally important. In such cases one must look at the record. The courts have acted on the principle that the rule of law should prevail and that inferior courts, acting within their jurisdiction, must act in accordance with the law. Therefore the courts will interfere when error of law appears on the face of the record. What is the record? That has been dealt with in the *Northumberland* case,[15] but never exhaustively. The extent of the record can only be stated in general terms; it differs according to the court and the circumstances of the case. Reliance is placed on the general language of Blackstone, already cited. The record comprises all those documents which the court keeps " for a perpetual memorial " and testimony." In the case of a technical inquiry it should contain (1) the facts which are in dispute, and (2) the technical background about which there is no dispute. As to the latter, the inferior tribunal cannot evade its duty by failing to explain the technical terms which it uses, and the court cannot divest itself of its duty to control the inferior tribunal merely because it has not explained the background facts. The duty here is clear —to take the relevant documents, the rival specifications, and construe them. In a technical case such as this it may well be convenient to include in the record such parts of the evidence as explain the undisputed technical terms; only so can the record fulfil its object of being understood. In a technical case the court can rely on technical dictionaries. Or it can, if it wishes, send the record back to the inferior tribunal. The proceedings should never be ineffective merely because the court finds difficulty in understanding the technical terms involved.

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[13] (1841) 1 Q.B. 66.

[14] [1922] 2 A.C. 128, 138–139, 151–152, 154–155, 158–160; 38 T.L.R. 541.

[15] [1952] 1 K.B. 338.

On a consideration of the record in the present case, it appears clearly that Lloyd-Jacob J., when he wrote his decision, had forgotten the tenor of the arguments addressed to him, failing to observe that in the appellants' specification claim 1 included alternative (D) set out in the appellants' analysis of claim 1, whereas the superintending examiner's decision was wholly based on risk of infringement of alternative (D). Before the tribunal the argument was entirely directed to this point, but the tribunal misstated it twice and did not refer at all to alternative (D). This omission amounts to a misconstruction of the appellants' specification. The matters mentioned by Lloyd-Jacob J. are irrelevant to the substantiality of the risk of infringement.

In summary: (1) This is not a case of excess of jurisdiction. (2) The tribunal made an error in law and its decision was wrong. (3) There is no distinction between a case involving technical matters and any other case so far as an application for certiorari is concerned. In its applicability there are no degrees of technicality. (4) The record here properly consists of the two specifications, the judgment of the tribunal and the judgment of the superintending examiner at the least. The court might think that it should include further explanations of technical matters. But it is not in fact necessary to send the case back to the tribunal, because the error appears from a reading of the decision of the tribunal and the two specifications alone. Alternatively, it appears from these documents supplemented by the superintending examiner's decision. (5) The court is not only entitled but bound to do all it can to enable it to understand the undisputed technical matters involved and could have appointed an expert to assist it.

Anthony Cripps Q.C. following. In certiorari there was originally no fundamental difference between quashing a decision for bias, excess of jurisdiction or any other reason. "Certiorari" means "to be made more certain." Its whole function is aimed at the examination of the record. The record has one particular quality which lies at the base of the whole theory of certiorari: see the passage in Blackstone already cited, which states the basic attribute of the record. If there is any defect in the record the court will order it to be amended. The court calls it up to see whether it is good or bad. In certiorari the court is acting as a supervisory court and not as an appellate court. The result is to quash the decision or nothing. Any fact recorded as a fact is unchallengeable, but any defect in the record may be amended. The record cannot extend a tribunal's own scope by a false assumption of jurisdiction. An attack on a record based on an error of fact will get nowhere. In an attack based on an excess of jurisdiction the record may be supplemented by affidavits, but they cannot contradict the record. The process of certiorari is a trial of the record to see whether it is good or bad.

Whatever the record includes in the present case, a reading of it will show that it is erroneous on the face of it. It is not clear what the tribunal's decision means and it should not be sustained. In theory the superior court may (1) order completion of the record, (2) supplement it by affidavits, or (3) quash it. The pre-eminence and authority attributed to the record requires that, if it speaks, it must speak clearly and intelligibly.

Geoffrey Tookey Q.C., *S. I. Levy Q.C.* and *John Hall* for the respondent company. At the root of the issue between the parties is a dispute on the technical facts. The respondents do not accept the appellants' technical explanations. It is not possible to embark on the respondents' technical argument because counsel are not agreed and the House of Lords could not decide which was right and which was wrong without going into the evidence. If it could be shown that there was error on the face of the record, all the House of Lords could do would be to quash it without expressing any view on the merits and leaving the tribunal to make a fresh approach to the matters in issue. The dispute cannot be treated merely as a matter of words. There must be a proper understanding of them and the claims must be interpreted in the context of the specifications taken as a whole: see *British Thomson-Houston Co. Ltd.* v. *Corona Lamp Works Ltd.*[16]

It is not a ground for granting certiorari that the judge has gone wrong on the facts or has misunderstood the arguments: see *Reg.* v. *Bolton.*[17] Here the judge's mistake is not an error of law on the face of the record. Certiorari cannot be made a cloak for an appeal. Its object is to see that the general law of the land is obeyed. The court should take care that on an application for certiorari it does not go behind the face of the record and decide a point of mixed fact and law. The error on the face of the record must be palpable and apparent. The record, according to Blackstone's definition, is what the inferior tribunal keeps "for a perpetual memorial and testimony" of its

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[16] (1822) 39 R.P.C. 49, 67.

[17] (1841) 1 Q.B. 66, 76.

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proceedings. In the present case the record is the judgment of the Patents Appeal Tribunal, the only document which it keeps. After the tribunal has given its decision a note of its order is indorsed in red on the back of the notice of appeal and transmitted to the Comptroller. All the papers supplied by the Comptroller are returned to him. The decision is filed by the registrar.

What is quashed on certiorari is the record which the tribunal has in its physical custody and control recording what was done. As to the inferior tribunal's obligation to make a "speaking" order, see *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore.*[18] R.S.C., Ord. 31, r. 15, does not mean that the pleadings are to be taken as incorporating every document referred to in them. *Rex* v. *Cheshire Justices, Ex parte Heaver*[19] is not dissimilar from the present case. In considering what is the record the matter must be looked at quite strictly. Here it cannot extend beyond the documents which the tribunal has in its control. The documents contended for by the appellants cannot form part of it. The judges can detect at once any misinterpretation or misapplication of law apparent on the face of the record. If an error in construing a document appears clearly on the face of the record certiorari lies. In no case has additional evidence been allowed save where the jurisdiction has been challenged.

Though the judges are presumed to know the general law, they are not presumed to have technical knowledge. The judges can deal with such expressions as "heirs of the body," because they are legal experts, but they cannot deal with medical terms: see *Gilmore's* case.[20] To look up the phrase in a medical dictionary, when there is a dispute relating to it, would not enlighten the judge; he would need the evidence of experts.

The law of certiorari should not be moulded to fit such cases as these. It should only be applied as it exists, that is, where error is apparent on the face of the record. Here error cannot be detected simply by comparing two phrases in the judgment of the tribunal. Before error could be found the House of Lords would have to construe the relevant specification, a document addressed to technical experts, which cannot be construed without explanations from technical experts. If in order to detect the error the House of Lords would require the help of technical experts, it is a contradiction in terms to say that an error of law

[18] [1957] 1 Q.B. 574, 582.

[19] (1912) 108 L.T. 374, 379; 29 T.L.R. 23.

[20] [1957] 1 Q.B. 534.

appears on the face of the judgment: see Halsbury's Laws of England, 3rd ed., vol. XI, p. 62, para. 119, the effect of which was approved in *Rex* v. *Minister of Health.*[21]

The Patents Appeal Tribunal was not bound to give reasons for its decision. It is too late now to complain of the absence of assessors below. If they were necessary the appellants should have insisted on their presence. But, in any event, assessors cannot supply the facts, which must be produced by the parties in the ordinary way.

In *Rex* v. *Board of Education* [22] (on appeal to the House of Lords *Board of Education* v. *Rice* [23]) it appeared that the board had not properly exercised its jurisdiction.

It is true that the judgment of Lloyd-Jacob J. treats alternative (B) as if it were the only alternative in question and ignores alternative (D). To lift the veil on what happened, the judge has taken the wrong alternative. He has taken alternative (B) when he should have taken alternative (D). Our contentions were never based on alternative (B), but on alternative (D). The only explanation we can suggest is that, at the end of the argument, the judge was in our favour, but that, owing to the time that elapsed before he came to write his judgment, he took the wrong alternative.

In summary, the respondents' submissions are: (1) The supervisory jurisdiction of the Divisional Court must be kept distinct from its appellate functions. The court will interfere by means of certiorari only if error of law appears on the face of the record. On the face of the record it cannot be ignored. (2) The " record " must be given a realistic and not an arbitrary or imaginary signification. It means that which the inferior court physically keeps as a formal record of its proceedings. It cannot be extended to include other documents. If the inferior court is required by law to keep its record in a particular form, it must do so, but otherwise it can choose its own form. (3) The mere fact that documents are referred to in the record does not make them part of the record. In the present case the only " record " is the decision of the Patents Appeal Tribunal, which is not required by law to keep any other record. (4) The term " on the face of the " record " means manifest to the judges looking at the record with judicial knowledge and nothing else. Otherwise the words

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[21] [1939] 1 K.B. 232, 246; 55 T.L.R. 4; [1938] 4 All E.R. 32.

[22] [1910] 2 K.B. 165, 179; 26 T.L.R. 422.

[23] [1911] A.C. 179, 185–186; 27 T.L.R. 378.

"on the face" have no meaning. The word "manifestly" comes from the *Northumberland* case[24] and *Davies* v. *Price.*[25] (5) There is no error of law on the face of this decision. On its face it is dealing with questions of fact, having regard to certain technical considerations, and the Court of Appeal was right in going straight to that point. (6) The suggested error of construction does not exist. The same remark would apply even if the specifications were added in to the record. The court could not understand the specifications without evidence.

The Court of Appeal was quite right in rejecting the application for the reasons given by Parker L.J.[26]

S. I. Levy Q.C. following. The decision of the superintending examiner cannot be part of the record and his findings of fact are not binding either on the respondents or on the Patents Appeal Tribunal, because that is the subject-matter of the appeal. Further, the whole argument before the tribunal was based on alternative (D) and there was never any suggestion of a risk of infringement of alternative (B).

Patrick Graham Q.C. in reply. The whole basis of the case is completely changed by the admission that Lloyd-Jacob J. did not consider the two alternatives. It is clear from the very words of his judgment itself that he never considered alternative (D) at all. It follows that the tribunal has in fact given a decision which was not on the point in respect of which the appeal was made. The only question outstanding was whether alternative (D) was infringed. The real error here lay in not answering the question asked. The judge did not answer the problem which he propounded to himself. When a tribunal fails to address its mind to the right problem, that amounts to an excess of jurisdiction. *Reg.* v. *Liverpool Justices*[27] is parallel to the present case. There the justices never considered whether there were special circumstances. Here the judge did not consider alternative (D). See also *In re Penny and South Eastern Railway Co.*[28]

The respondents' admission relieves the appellants from the necessity of showing that there was an error of law and shifts the onus of proof onto the respondents.

The "record" is not limited to the documents which the Patents Appeal Tribunal in fact keeps as a matter of administrative convenience. The Queen's Bench could order it to get the other documents from the Patent Office.

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[24] [1951] 1 K.B. 711; [1951] 1 T.L.R. 270; [1951] 1 All E.R. 268; (C.A.) [1952] 1 K.B. 338, 355, 357.

[25] [1958] 1 W.L.R. 434, 441.

[26] [1959] 1 Q.B. 105, 112–123.

[27] [1959] 1 W.L.R. 149, 153; [1959] 1 All E.R. 337.

[28] (1857) 7 E. & B. 660.

It is a long time since certiorari has been considered by the House of Lords. The last time was *Walsall Overseers* v. *London and North Western Railway Co.*[29] The establishment at the present time of so many inferior tribunals demands a sensible view of the matter. The court should apply a sensible practical rule here to the effect that this tribunal should send up such documents as initiate the proceedings. These should include the notice of appeal to the tribunal, which gives it its jurisdiction. This is part of the record and incorporates the decision in the true sense.

There is no question of the court having a discretion in this matter in the broad sense of having the right to exercise or not to exercise a discretion. This writ is granted ex debito justitiae provided the applicant is the person aggrieved and has not disqualified himself by, say, fraud or delay: see *Gilmore's* case.[30] As to quashing, see R.S.C., Ord. 59, rr. 3 and 4.

As to the status of the tribunal, it is wrong to treat it as a technical tribunal, since any High Court judge may be appointed to it. The Patent Office is very different. A patent is a public document: see section 21 of the Patents Act, 1949. The duty of the court is to see that the Great Seal is not attached to a document which is not in proper form as laid down by the Act

Their Lordships took time for consideration.

May 14. LORD MORTON OF HENRYTON (read by Lord Somervell of Harrow). My Lords, the question for decision in this House is whether there is or is not any error of law on the face of the record of the Patents Appeal Tribunal (Lloyd-Jacob J.) in the present case. That tribunal reversed interim and final decisions of the superintending examiner (Mr. E. T. Vincent acting for the Comptroller-General of Patents) whereby, in opposition proceedings under section 14 of the Patents Act, 1949, he ordered that there should be inserted in the third and fourth respondents' letters patent No. 703,630 a specific reference to the appellants' letters patent No. 658,823.

The first and second respondents were not represented at the hearing of this appeal and I shall hereafter refer to the third and fourth respondents as "the respondents."

[29] (1878) 4 App.Cas. 30.

[30] [1957] 1 Q.B. 574, 590.

This appeal has taken an unusual course, and in order to state the matters to be considered by this House it is necessary to set out the history of the case in some detail. I shall first state the relevant provisions of the Patents Act, 1949. They are as follows:

By section 14: " (1) At any time within three months from " the date of the publication of a complete specification under this " Act, any person interested may give notice to the comptroller " of opposition to the grant of the patent on any of the following " grounds:— . . . (*g*) that the complete specification does not " sufficiently and fairly describe the invention or the method by " which it is to be performed; . . . (2) Where any such notice " is given, the comptroller shall give notice of the opposition to " the applicant, and shall give to the applicant and the opponent " an opportunity to be heard before he decides on the case. . . . " (4) An appeal shall lie from any decision of the comptroller " under this section."

By section 9: " (1) If, in consequence of the investigations " required by the foregoing provisions of this Act or of proceedings " under section 14 or section 33 of this Act, it appears to the " comptroller that an invention in respect of which application " for a patent has been made cannot be performed without substantial risk of infringement of a claim of any other patent, " he may direct that a reference to that other patent shall be " inserted in the applicant's complete specification by way of " notice to the public unless within such time as may be prescribed either—(*a*) the applicant shows to the satisfaction of " the comptroller that there are reasonable grounds for contesting " the validity of the said claim of the other patent; or (*b*) the " complete specification is amended to the satisfaction of the " comptroller. . . . (3) An appeal shall lie from any decision or " direction of the comptroller under this section."

By section 85: " (1) Subject to the provisions of this Act " with respect to Scottish appeals, any appeal from the comptroller under this Act shall lie to the Appeal Tribunal. . . . " (7) Upon any appeal under this Act the Appeal Tribunal may " exercise any power which could have been exercised by the " comptroller in the proceeding from which the appeal is " brought. . . . (9) Rules made under this section shall provide " for the appointment of scientific advisers to assist the Appeal " Tribunal upon appeals under this Act and for regulating the " functions of such advisers; and the remuneration of a scientific " adviser appointed in accordance with such rules shall be " defrayed out of moneys provided by Parliament. (10) An appeal "to the Appeal Tribunal under this Act shall not be deemed to "be a proceeding in the High Court."

By section 87 (1): "An appeal shall lie to the Court of "Appeal—(*a*) from any decision of the Appeal Tribunal on an "appeal under section 33 or section 42 of this Act where the "effect of the decision is the revocation of a patent; (*b*) from any "decision of the Appeal Tribunal under section 55 of this Act; "(*c*) with the leave of the Tribunal, from any decision of the "Tribunal under section 14 of this Act, where the effect of "the decision is the refusal of the grant of a patent on the "ground specified in paragraph (*d*) or paragraph (*e*) of sub-"section (1) of that section."

The effect of the provisions of sections 9 (3), 14 (4), 85 and 87 is that no appeal lies to the Court of Appeal from the decision of the Patents Appeal Tribunal in the present proceedings, that the Appeal Tribunal is an inferior tribunal, and that the only remedy of persons aggrieved by a decision of that tribunal is by way of order of certiorari.

[His Lordship stated the facts and continued:] Parker L.J., in a judgment with which the other Lords Justices concurred, stated the contention of counsel for the appellants as follows [1]:

"Mr. Graham, on behalf of the appellants, puts his contention "in this way. Before the tribunal can decide whether there is "a substantial risk of infringement, it must construe the rival "specifications. The construction of a written document is a "matter of law. Reading the decision of the tribunal (so he says) "it is clear that the tribunal must have misconstrued the speci-"fications, and accordingly there is an error of law on the face "of the record.

"It is clear that proceedings such as these are in no sense "by way of appeal. The court can look, and look only, at the "reasoned decision, and at such other documents as can fairly "be said to form part of the record. If no reasoned decision "is given, the error of law, if error there be, will not be detected. "The face of the record (as Lord Sumner put it in *Rex* v. *Nat* "*Bell Liquors Ltd.*[2]) was then 'the inscrutable face of a sphinx.' "In the ordinary case, where, as here, what is called a 'speaking "'order' is made, the error, if error there be, takes the form of "the misconstruction or misapplication of a statute or regulation.

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[1] [1959] 1 Q.B. 105, 110; [1958] 2 W.L.R. 1010; [1958] 2 All E.R. 368.

[2] [1922] 2 A.C. 128, 159; 38 T.L.R. 541.

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"This case, so far as I know, is the first case where it is said "that the error consists of the misconstruction of some other "document. Logically, however, if that document does form "part of the record and the decision on its face shows that the "tribunal has misconstrued it, I do not see why certiorari will "not lie. It is an error of law, albeit one different from that "sometimes found."

My Lords, Mr. Graham's argument in this House was to the same effect, and I entirely agree with the passage which I have just quoted. The learned Lord Justice then went on to hold that the two specifications formed part of the record but found it unnecessary to determine whether or not the decision of the superintending examiner also formed part of the record. He then pointed out that in order to determine whether either of the specifications had been misconstrued it was necessary for the court to decide what the right construction was. The documents dealt with technical matters of science, and technical terms were used. Where technical words were used in a document they were prima facie used in a technical sense and evidence could, and indeed must, be given to enable the court to understand the meaning of the language used. The Lord Justice was satisfied that the court could not construe the specifications without being informed by evidence and, that being so, the application failed in limine because the court in such proceedings was not entitled to look at the evidence given in the proceedings or to receive new evidence on affidavit.

My Lords, I fully appreciate the difficulty felt by the Divisional Court and the Court of Appeal, and I agree that in cases where an order of certiorari is sought on the ground of error of law on the face of the record, the court is not entitled either to look at the evidence given in the proceedings or to receive new evidence. There are, however, other means whereby the meaning of technical words may be ascertained. For instance, counsel are sometimes ready to agree that well-known technical words have a particular meaning. In the present case the House was greatly assisted by an analysis of claim 1 of the appellants' specification No. 658,823, which was prepared by the appellants for the use of the Court of Appeal and accepted as correct by counsel for the respondents. Moreover, the court has power to appoint assessors under section 98 of the Supreme Court of Judicature (Consolidation) Act, 1925.

It would, indeed, be regrettable in present times, when certiorari lies to so many tribunals dealing with scientific matters, if the courts were precluded from considering whether there was an error of law on the face of the record because they did not know the meaning of certain technical terms.

Your Lordships heard considerable argument as to what documents did or did not form part of the record in the present case. Mr. Graham submitted that the record included at least the decision of the superintending examiner, the notice of appeal to the Appeal Tribunal, the decision of the Appeal Tribunal and the two relevant specifications, and your Lordships have looked at all these documents de bene esse. I am content to assume that they all form part of the record, for, even on this assumption, I do not find any error of law on the face of the record.

The vital passage in the decision of the superintending examiner is as follows. Speaking of the respondents' specification No. 703,630 (they were the applicants before him) he said:

"I am satisfied that there is resistance, be it resistance U or "the resistance of winding 2, through which current is injected "by secondary winding 12, and this resistance is connected, by "switch 14, on the dead side of the circuit-breaker 6. The "current arises at the secondary winding 12, and the fault circuit "comprises the lines 7, 8, 9 and the fault to earth. Accordingly, "the injection of the current is achieved by all the components "disposed between the winding 12 and the lines 7, 8, 9, namely, "the resistance U, the winding 2 and the switch 14. I find no "difficulty in reading this arrangement on to the phrase in claim 1 "of specification 658,823, 'by means of a resistance' whether "it be resistance U or the resistance of winding 2. As a result, "I find that the invention described in applicants' specification "703,630 cannot be performed without substantial risk of infringe-"ment of claim 1 of opponents' specification 658,823."

Now, the analysis of claim 1 of this specification, to which I have already referred, states that "The claim includes four "alternatives and is equivalent to four separate claims rolled into "one." It then sets out the four alternative claims, identifying them by the letters (A), (B), (C) and (D), and it is said by counsel for the appellants that the reasoning of the superintending examiner applies directly to alternative claim (D). I think that this is so.

I now turn to the decision of the Patents Appeal Tribunal. It is short and I find it necessary to set it out in full. When the tribunal refers to "the applicants" or to "the appellants" he is, of course, referring to the present respondents.

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"By this appeal the applicants for letters patent No. 703,630 "seek a reversal of two decisions given by Mr. E. T. Vincent "(superintending examiner, acting for the Comptroller-General) "dated June 15, 1956, and August 31, 1956, and ask that their "patent may be sealed without either amendment or the insertion of a specific reference to letters patent No. 658,823.

"The hearing officer came to the conclusion that the performance of the applicants' invention would involve substantial "risk of infringement of the cited letters patent, the material "claim of which reads as follows: 'An earth leakage protective "'control system for electric motors, cables or other apparatus "'operating on polyphase A.C. in which the reclosing of a "'circuit breaker or contactor under earth fault conditions is "'prevented by a lock out relay energised by rectified A.C. "'which is, or is derived from current injected through the "'fault circuit by means of a neutral point inductance or resistance, or a resistance connected on the dead side of the circuit "'breaker or contactor.'

"The general similarity of the applicants' construction to "apparatus covered by this claim is not and cannot be disputed. "It is an earth leakage protective control system for loads operating on three-phase A.C. and is designed to prevent by relay "action the reclosing of a circuit breaker which has been opened "on an earth fault occurring. The relay for such reclosing is "electrically energised through a resistance by current derived "from the mains supply. The characteristic of the opponents' "claim which it is contended does not appear in the appellants' "construction is that which specifies that the operation of the "relay is to be by rectified A.C. passing through a resistance. It "is conceded that the relay is operated by current, and that a "resistance is in circuit but it is urged that the current which "passes through the relay is not rectified A.C. This, on the "face of it, would appear to be a simple matter of technical "significance susceptible of ready proof by evidence. The "decision proceeds upon the basis that the presence of rectifier "4 in the circuit which energises the relay necessarily provides "rectified current, as indeed it must, but holds that the current "'injected through the fault circuit' is provided by the secondary winding 12 and passes through a resistance, another "winding 2, a switch 14, a power line through the fault to "earth and so back to 12, thus specifying a circuit for the "current which does not include any rectifier. The appellants' "argument, as I understand it, proceeds upon the basis that if, "contrary to their view, any part of their apparatus can be said "to inject current through the fault circuit, that can only be "possible through the circuit specified by the hearing officer as "just set out, and in consequence, no rectification of the alternating current is required or provided. Neither the evidence "filed nor the decision contain matters which would justify me "in holding that this contention may not be well founded and "as the substantiality of any risk of infringement depends upon "a finding that the contention is ill-founded, I find myself "unable to support the decision.

"The direction that a reference in the form prescribed by "rule 35 must be inserted in the application before sealing is "therefore reversed."

My Lords, I must now analyse this decision to see whether it contains, on its face, an error of law, and I do so assuming that for this purpose I am entitled to look at all the documents which are said by Mr. Graham to be part of the record. The tribunal first sets out the whole of claim 1 of specification No. 658,823. He then, down to the words "mains supply," makes certain observations on specification No. 703,630. These are not criticised by counsel for the appellants.

The next passage, down to "is not rectified A.C.," is strongly criticised by counsel for the appellants. They say that it entirely misstates the argument presented to the tribunal. That may be so, and it is a fact that a vacation intervened between the argument and the decision, but a misstatement of counsel's argument is not an error of law. Still less is it an error of law which appears on the face of the record. The next sentence is not and could not be relied upon as containing an error of law, and the same observation applies to the next sentence, which briefly describes the basis of the decision of the superintending examiner. Then follow two sentences containing one statement which does, I think, result from a consideration of the construction of the relevant specifications. That statement is that the substantiality of any risk of infringement depends upon a finding that an argument addressed to the tribunal by the then appellants (the present respondents) was ill-founded.

Mr. Graham contends that this statement shows that the tribunal, when he wrote his decision, must have forgotten the tenor of the argument and must have omitted to notice that claim 1 of the appellants' specification includes alternative (D). He says that the decision of the superintending examiner was based entirely on the risk of infringement of alternative (D);

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consequently the argument before the tribunal was directed entirely to the question whether performance of the respondents' invention would or would not infringe alternative (D); the argument has twice been misstated by the tribunal, who makes no reference to alternative (D); and the concluding statement by the tribunal reveals an error of law, for the substantiality of the risk of infringement does not depend upon the matters mentioned by the tribunal. The tribunal must have misconstrued specification No. 658,823 by omitting to notice that alternative (D) was included in claim 1.

My Lords, I cannot draw this conclusion from anything that appears on the face of the record. It is true that the decision of the tribunal contains no reference to alternative (D), and that I should have expected the argument before the tribunal to concentrate on the risk of infringing alternative (D); but it does not appear *on the face of the record* that the tribunal ever heard any argument on this point, and the omission of any reference to alternative (D) may be due to the fact that the tribunal did not consider that there was any substantial risk of infringement of that alternative, and therefore directed his attention to other possibilities of infringement. If the present proceedings had been an appeal from the tribunal's decision, it would have been the duty of this House to hear argument and evidence directed to the question whether there would or would not have been any substantial risk of infringement of alternative (D), if the respondents' invention were put into operation; but the legislature has not thought fit to give a right of appeal in this case, and the tribunal's omission to deal with the question just stated does not amount to an error of law on the face of the record, whether or not the record includes the documents already mentioned.

For these reasons I would dismiss the appeal with costs.

LORD REID. My Lords, I agree that this appeal should be dismissed, and I only add some observations because I would base my decision on reasons different from those adopted by the Court of Appeal. Procedure by way of certiorari is available both where there has been "excess of jurisdiction" (which is not a very adequate description) and where error of law appears on the face of the record. But there is this difference between these classes of case: in the former the court can be informed of the whole circumstances, in the latter it cannot, and this case admittedly belongs to the latter class. The appellants can only succeed if it appears on the face of the record that the tribunal has erred in law. The question what constitutes the record and whether or how far it is permissible to look beyond the order under review is one of great importance, but one on which I find it unnecessary to express any opinion in this case. I shall therefore assume, without deciding, that this record includes all the documents which the appellants maintain that it does include—not only the decision of the tribunal but also the decisions of the superintending examiner and the specifications Nos. 658,823 and 703,630.

The question which the examiner and the tribunal had to decide was whether the invention described in the latter specification could be performed without substantial risk of infringement of claim 1 of the former specification. That is in itself a question of fact, but it cannot be answered until the meaning of the relevant parts of the two specifications has been determined, and the construction of documents is a matter of law. If the record showed that the tribunal had wrongly construed the former specification I should regard that as an error of law appearing on the face of the record, and therefore I think it necessary to examine the documents said to form the record.

Before doing so, I must deal with an important matter. With what knowledge or equipment is a court entitled to examine a document? A judge is supposed to know the law, the English language and such facts as are common knowledge. If he refers to authorities or dictionaries or other works dealing with these matters he can safely do so because his general knowledge enables him to check and appreciate them. But if without assistance he attempts to handle highly technical matters he may easily go astray. Some fairly simple technical matters can nowadays be considered to be common knowledge, and I would not attempt to draw the line—it may alter from time to time. In this case some of the terms used are simple enough but some are certainly not. So what is a court to do if on the face of a record there are technical terms which cannot be understood without expert assistance? There may be cases where a very little assistance is all that is necessary, and I would think it unfortunate if such a strict rule were laid down that the mere presence of some technicality is enough to prevent a court from proceeding further in the absence of evidence to explain it.

Technicalities crop up in a great variety of cases and, when the parties are not in dispute about them, they are often explained without evidence. Counsel give explanations and by doing so they are not giving anything away: if they were not in agreement evidence would be led. But in a case where it is not competent to lead evidence counsel could not, in my view, properly be asked to help in this way unless there is some other way for the court to get the necessary information. If his client's interests might suffer by his giving such explanation counsel is quite entitled to withhold it, and the court could not proceed on information given by one side only. But there do appear to be methods by which a court can go some way in acquiring technical information without evidence, for example, by means of an assessor.

If the court finds that there is genuine dispute and real doubt about any technical matter, then I do not think that it can proceed farther without evidence. But the relevant technicalities in this case are not in dispute—I mean relevant for the purpose of examining those parts of the tribunal's decision which are said to exhibit an error of law. So I think that I must make that examination in light of the explanations which have been given by counsel.

Claim 1 of the appellants' specification contains four alternatives. That is apparent from the language and structure of the claim. The error in law alleged is that the tribunal misconstrued the claim and left out of account the fourth alternative. This is the alternative on which the examiner based his decision and which a fairly simple explanation aided by the diagrams in the specifications shows to be the only one at all closely resembling the respondents' invention. Of course, I express no opinion whether or not full examination would disclose any real resemblance.

Parts of the decision are not very easy to follow, but there seems to be no doubt that in his decision the learned judge who was the tribunal did not mention or allude to this fourth alternative. He dealt chiefly with another of the alternatives. In the end the point for decision appears to me to be this: can it properly be inferred from the terms of his decision that the learned judge misconstrued claim 1? He set out the claim in full in his decision and, if there had been any obligation on him to set out all his reasons, silence as to this alternative might have afforded ground for such an inference. But he was not bound to set out his reasons in full, and all the indications are that he was well aware of this fourth alternative. It had been dealt with by the examiner and had been, we were informed, the main subject of argument before him. There is nothing to indicate that he had decided in his own mind that he ought not to or would not consider it. In these circumstances, it does not seem to me to be likely, far less to be clear, that his failure to deal with this alternative in his decision was caused by any error of law on his part. And that is sufficient to dispose of this case.

Lord Tucker. My Lords, in this case the appellants sought to quash by certiorari a judgment of the Patents Appeal Tribunal dated January 17, 1957. The application to the Divisional Court was on the ground that the Patents Appeal Tribunal "was "acting in excess of jurisdiction and without jurisdiction and its "judgment and decision was wrong in law and bad on the face "of the said decision."

It was clear from the outset that there was no excess or lack of jurisdiction and there can be no doubt that the statute having given no right of appeal it is of no avail to allege that the decision was wrong in law. The sole remaining ground, therefore, was that the decision was bad on its face, and this at once presents the problem of what is the face of the decision. The appellants sought to refer, in addition to the written judgment of the tribunal, to their patent specification No. 658,823, the respondents' patent specification No. 703,630 and the decision of the superintending examiner from which appeal had been brought to the Patents Appeal Tribunal, on the ground that these documents formed part of the "record" of the tribunal and could therefore be looked at. Your Lordships decided to look at these documents de bene esse before giving any decision as to their admissibility. Your Lordships also heard from counsel for the appellants a detailed explanation of the meaning of the specifications and of the questions at issue on the appeal. These explanations counsel for the respondents was unable to accept as he was quite properly standing on his submission that nothing could be looked at outside the judgment or, in the alternative, that these documents did not form part of the record of the tribunal.

My Lords, I agree with those of your Lordships who, having looked at these documents, have come to the conclusion that there is nothing to be found therein to show that the judgment contains an error of law. It accordingly became unnecessary for your Lordships to decide whether it would have been permissible to act upon these documents if they had disclosed that the judgment was erroneous in law, and I therefore desire to emphasise that there is nothing in your Lordships' decision in the

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present case that can be quoted as any authority as to the meaning of the word "record" in this context or as to whether the court can or will look beyond the actual order or decision in the case of a "speaking order" to discover whether error in law exists or not, or what documents constitute "the record" if the court orders the record to be brought before it. These questions may require decision at some future date. When that time arrives it may be necessary to consider whether the word "record" in relation to certiorari to quash for error on the face means anything more than the order or decision as recorded. It is well settled that in the case of a non-speaking order or judgment it is not permissible to look beyond the record which in the language of Lord Sumner in *Rex* v. *Nat Bell Liquors Ltd.*[3] is "the inscrutable face of a sphinx." Is there a difference when the order speaks but speaks with the ambiguous voice of the oracle? This may some day call for decision.

In this connection I desire particularly to reserve for future consideration certain obiter dicta on this subject made in the Court of Appeal in *Rex* v. *Northumberland Compensation Appeal Tribunal.*[4] I am not to be taken as casting any doubt on the actual decision in that case, which I think was clearly right. Nor are my reservations to be read as applying to certiorari in general. They are confined solely to certiorari to quash on the ground of error in law on the face of the recorded order or decision. Cases of excess or lack of jurisdiction properly understood, as explained by Lord Sumner in *Rex* v. *Nat Bell Liquors Ltd.*,[5] are clearly distinguishable, although much confusion has arisen from failure to observe the distinction.

My Lords, subject to these reservations, I agree that this appeal should be dismissed.

LORD SOMERVELL OF HARROW. My Lords, I agree with the opinion delivered by my noble and learned friend, Lord Tucker. The present case shows how important the issue as to what constitutes the face, on which error must be found, may be. I have looked at a number of ancient and modern cases on certiorari and am satisfied that the point is a difficult one which should be left to be decided after full argument if and when it arises.

LORD DENNING. My Lords, in the case for the appellants, which is submitted to this House, an order for certiorari is sought upon the ground that there is an error of law on the face of the record, and on other grounds. When certiorari is sought upon such a ground, evidence is not as a rule admissible. The error must appear on the face of the proceedings without the aid of extrinsic evidence.

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[3] [1922] 2 A.C. 128, 159; 38 T.L.R. 541.

[4] [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122.

[5] [1922] 2 A.C. 128.

But what is the "record" for this purpose? It is not confined to the formal record of the proceedings such as is kept by a superior court of record, which used to be enrolled on parchment in Blackstone's day and is filed at the Central Office in our day. Certiorari goes to all inferior tribunals, not only to those which are courts of record, but also to those which are not; and not only to those which keep a formal record, but also to those which do not. When certiorari issues to any of these tribunals, there must be brought before the Queen's Bench not only the formal order of the tribunal but also, as the old writ said, "all things touching "the same"; and this includes the reasons for the decision when the tribunal gives them. This goes back as far as the time of Holt C.J. In 1702 in *Ryslip Parish* v. *Hendon Parish*,[6] a case where justices had ordered a poor man to be removed from Ryslip to Hendon, he said: "Where the justices of peace do give "a special reason for their settlement, and the conclusion which "they make in point of law will not warrant the premises, there "we will rectify their judgment: but if they have given no reason "at all, then we will not ravel into the fact." The court would not compel a tribunal to give its reasons if it did not wish to do so: but if it did so, it became part of the record then, just as it does today under section 12 (3) of the Tribunals and Inquiries Act, 1958.

Your Lordships have been invited now to determine what documents are to be brought up in the case of certiorari to an appellate tribunal. Do they include the decision at first instance? To answer this question I have done as Earl Cairns L.C. did in *Walsall Overseers* v. *London and North Western Railway Co.*[7] I have gone back to the old days when quarter sessions sat as an appellate tribunal on appeal from justices in civil matters. When the King's Bench issued a certiorari to quarter sessions, it was the invariable practice for the documents to include, not only the order of quarter sessions who had heard the appeal, but also the order of the justices who had heard the case at first instance, and also any other document which was recited or referred to by quarter sessions in terms which showed that it was the basis of the decision. The principle was well stated in a case in 1732 concerning a poor rate which had *not* been made part of the order of quarter sessions but had been sent back to the parish officers. Lord Raymond C.J. said: " A certiorari goes to remove the order, " and for what? Why, to see whether it be good or not, and how " can we judge whether the rate be good or not, unless we see it. " I have been for some time of opinion that when a certiorari " goes to remove orders cum omnibus ea tangen, everything ought " to be removed that may set the thing in a true light. I do not " mean every matter of fact, for that is impossible; but how can " we know whether this rate be good, unless it be returned." And Probyn J. made the pertinent comment: " To what end is " a certiorari granted, if it can only remove the order, and that " on which it is grounded cannot appear ": see *Rex* v. *Uttoxeter (Inhabitants)*.[8] " That on which it is grounded " always included the decision at first instance.

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[6] (1702) Holt 572.

[7] (1878) 4 App.Cas. 30.

This rule was not confined to cases where the quarter sessions stated the facts specially for the opinion of the court. It extended to all cases where they gave their reasons, even without stating a case. There are many cases to be found where on certiorari the Court of King's Bench had before them the reasons given by the justices at first instance, as well as the reasons given by quarter sessions on the appeal; and the King's Bench considered the two together so as to see whether an error of law was disclosed on the face of them. So it was in the days of Holt C.J. (see *Rex* v. *Alverston*[9]), and of Lord Hardwicke (see *Rex* v. *Bourn (Inhabitants)*[10]) and Lord Mansfield (see *Rex* v. *Upton Gray (Inhabitants)*[11]).

I am here speaking only of orders made by quarter sessions on appeals in civil matters. I am not speaking of convictions by justices in criminal matters at first instance: for they always were on a special footing. Before Jervis's Act the conviction itself had to contain everything. It had to set out the information, the evidence and the adjudication, as I explained in *Rex* v. *Northumberland Compensation Appeal Tribunal*.[12] And in such cases, of course, the King's Bench would not look at anything outside the conviction—see *Rex* v. *Liston*[13]; not even at the information itself to show a variance—see *Rex* v. *Cashiobury Justices*.[14] But in orders on appeals it was different. The court always looked at

[8] (1732) Cunn. 28n.; 1 Sess.Cas. K.B. 163.

[9] (1698) Holt 507.

[10] (1735) Burr.S.C. 39.

[11] (1783) Cald.Mag.Cas. 308.

[12] [1952] 1 K.B. 338, 348.

[13] (1793) 5 T.R. 251.

[14] (1823) 3 D. & R. 35.

the decision at first instance to see if there was a variance, as Lord Hardwicke did in *Rex* v. *Bourn* (*Inhabitants*).[15]

Now turning to modern cases, it will be seen that, in our day, too, the courts have proceeded on the footing that there should be included in the record, not only the formal order, but all those documents which appear therefrom to be the basis of the decision —that on which it is grounded. Such as the claim for compensation in the *Northumberland* case,[16] the report of the medical specialist in *Gilmore's* case[17] and the medical certificates in *Reg.* v. *Head.*[18] Is it really to be supposed that the Crown in those cases made concessions which it was not bound to make and could have successfully resisted the issue of certiorari? None of the counsel before your Lordships suggested it. Nor did they refer to the arbitration cases which are very different, because certiorari does not lie to arbitrators. There is no "record" to be considered, only the award. There is no reference to "all things touching the same." But even there, the courts will look at documents which appear from the award to be the basis of the decision (see *Landauer* v. *Asser*,[19] as explained in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co. Ltd.*[20] and *D. S. Blaiber & Co. Ltd.* v. *Leopold Newborne* (*London*) *Ltd.*[21]).

Applying these principles, I think the decision of the superintending examiner should be treated as part of the record. It seems to me plain that, in order to know the ground of the decision of the Patents Appeal Tribunal, it is necessary for the court to have before it the decision of the superintending examiner. I can think of no document more closely "touching the same." Furthermore, the Patents Appeal Tribunal itself recites the decision of the superintending examiner and refers to it in terms which show that it is the very basis of the tribunal's decision, in that it is the basis from which all the reasoning of the tribunal stems. It is true that the tribunal does not confirm the examiner's decision. It reverses it. But that can make no difference. Whether confirmed or reversed, the decision is part of the record. So also with the specifications. They are the very basis of the decision.

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[15] (1735) Burr.S.C. 39, 40.

[16] [1951] 1 K.B. 711; [1951] 1 T.L.R. 270; [1951] 1 All E.R. 268; (C.A.) [1952] 1 K.B. 338.

[17] [1957] 1 Q.B. 574.

[18] [1958] 1 Q.B. 132, 138; [1958] 2 W.L.R. 617; [1958] 1 All E.R. 679.

[19] [1905] 2 K.B. 184, 191; 21 T.L.R. 429.

[20] [1923] A.C. 480, 487; 39 T.L.R. 253.

[21] [1953] 2 Lloyd's Rep. 427.

But when your Lordships turn to consider the documents which thus form the record, there is an initial difficulty. They are full of electrical technicalities. When counsel offered to explain them, the High Court rejected his offer, saying[22]: " . . . " we do not go into the technical details because, if we did, we " should not understand them." When the case reached the Court of Appeal, counsel did embark on an explanation, but the court seem to have regarded his efforts as evidence which, on an application of this kind, it was not permissible for them to receive. " We cannot construe the specifications," they said,[23] " without being informed by evidence, and, that being so, the " application for an order for certiorari must fail in limine."

My Lords, whenever the meaning of words arises, however technical or obscure, then, unless there is some dispute about it, it is common practice for the court to inform itself by any means that is reliable and ready to hand. Counsel usually give any necessary explanation: or reference may be made to a dictionary, which may be a general dictionary or even a technical one. If the subject-matter is too difficult to be resolved by such means, the court can always call in aid an assessor specially qualified to explain it, see section 98 of the Judicature Act, 1925, and this has been done from time to time, see, for instance, *Mercer* v. *Denne*[24] and *Esso Petroleum Co. Ltd.* v. *Southport Corporation.*[25] The one thing that the court ought not to do is to refuse jurisdiction in a case because it does not understand the technical terms employed in it. Scientists and engineers are entitled to have their rights enforced and their wrongs redressed as well as anyone else: and the court must possess itself of whatever information is necessary for the purpose. Some judges may have it already because of their previous experience. Others may have to acquire it for the first time. But in either case the information they glean is not evidence strictly so called. When an assessor explains the technicalities, he does not do it on oath, nor can he be cross-examined. And no one ever calls the author of a dictionary to give evidence. All that happens is that the court is equipping itself for its task by taking judicial notice of all such things as it ought to know in order to do its work properly.

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[22] [1957] R.P.C. 465, 468.

[23] [1959] 1 Q.B. 105, 113.

[24] [1905] 2 Ch. 538, 544; 21 T.L.R. 760.

[25] [1956] A.C. 218, 222–223; [1956] 2 W.L.R. 81; [1955] 3 All E.R. 864.

In the present case your Lordships did have the benefit of explanations by counsel and the point at issue appeared clearly enough. The appellants own a patent for an electrical device. It is numbered 658,823. The specification contains a claim defining the scope of the invention claimed by them. It includes four alternatives and is equivalent to four separate claims rolled into one which were conveniently identified as alternatives (A), (B), (C) and (D).

The respondents seek to obtain a patent for a similar electrical device. Their application is numbered 703,630. The appellants objected to this patent being granted to the respondents because they said that, if it was performed, there was a substantial risk of it infringing their patent No. 658,823.

The matter came before the superintending examiner at the Patent Office. He held that, if the respondents' invention No. 703,630 were performed, there was a substantial risk that it would infringe No. 658,823 by infringing alternative (D), but no risk of it infringing alternative (A), (B) or (C). So he directed that there should be inserted in the respondents' patent a special reference which was to be in these words: "Reference has been directed "in pursuance of section 9, subsection (1), of the Patents Act, "1949, to Patent No. 658,823."

The respondents appealed from this decision to the Patents Appeal Tribunal. The tribunal reversed the decision of the superintending examiner and held that no special reference should be inserted. The judgment makes no reference to alternative (D) at all. It speaks as if the only alternative in question was alternative (B). It takes alternative (B) as "the characteristic" in dispute; and finds that, as there is no substantial risk of infringing alternative (B), the decision of the superintending examiner must be reversed.

I believe that this was apparent to some of your Lordships as soon as you had studied the decision of the tribunal in conjunction with the decision of the superintending examiner: and when you pressed Mr. Tookey upon it, he was constrained to admit the force of it. He, thereupon, to use his own words, lifted the veil and felt the better for it. "The judge has taken the wrong "alternative," he said. "He has taken alternative (B) whereas "he should have taken alternative (D). Our contentions were "never based on alternative (B) but on alternative (D). The "only explanation we can suggest is that, at the end of the argument, the judge was in our favour, but that, owing to the time "which elapsed before he came to write his judgment, he took the "wrong alternative." Mr. Levy, who followed Mr. Tookey on the same side, made it doubly clear that the argument before the tribunal was based on alternative (D) and not on alternative (B) at all. No one suggested that there was any risk of alternative (B) being infringed. But Mr. Tookey declared that the decision itself was correct. It was inconceivable, he said, that the judge had overlooked alternative (D). The judge must have considered it and found that there was no substantial risk of it being infringed. But he failed to mention it in his written reasons. If it were permissible to speculate on what the judge had in mind, I would agree that that is the probable explanation of what happened, but where I differ is, that I do not think it is permissible to surmise or speculate upon it. We have only the written reasons of the judge to go upon, and we cannot presume that he went by any other. It has long been decided that "when a "reason is assigned as the foundation of a judgment, all presump-"tion or intendment that the court went upon better grounds is "excluded": see Burn's Justice of the Peace, 30th ed., vol. V, p. 374. That statement rests on the authority of Lord Mansfield himself, supported by Willes and Buller JJ., who sat beside him, see *Rex* v. *Upton Gray*[26] and if it is correct, as I think it is, it forbids us from presuming that the judge took alternative (D) into account.

Excluding, therefore, all presumption or intendment, it appears to me that the written decision of the tribunal is based on what was, in the circumstances, an extraneous consideration (namely, that there was no substantial risk of infringing alternative (B)) and fails to take into account a very relevant and indeed vital consideration (namely, whether there was any substantial risk of infringing alternative (D)).

Is that an error of law? I have no doubt that it is: and it is an error of such a kind as to entitle the Queen's Bench to interfere. There are many cases in the books which show that if a tribunal bases its decision on extraneous considerations which it ought not to have taken into account, or fails to take into account a vital consideration which it ought to have taken into account, then its decision may be quashed on certiorari and a mandamus issued for it to hear the case afresh. The cases on mandamus are clear enough: and if mandamus will go to a tribunal for such a cause, then it must follow that certiorari will go also: for when a mandamus is issued to the tribunal, it must hear and determine the case afresh, and it cannot well do this if its previous order is still standing. The previous order must either be quashed on certiorari or ignored: and it is better for it to be quashed.

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[26] Cald.Mag.Cas. 308.

I need not, I think, refer to the cases on mandamus, except perhaps to mention the judgment of Lord Reading C.J. in *Rex* v. *London County Council*.[27] But I must prove the point about certiorari. I can do it by several cases. In *Board of Education* v. *Rice*[28] the Board of Education, in coming to their decision (that the local authority had not failed in their duty), took into consideration the wrong question and failed to take into the consideration the questions which had been raised for their determination. In *Rex* v. *Pontypridd County Court Registrar*[29] the Registrars regarded £400 as the maximum compensation and failed to consider whether it was adequate. In *Rex* v. *Northumberland Compensation Tribunal*,[30] the Tribunal, in assessing compensation for loss of employment, took into account only Shaw's service with the hospital board and failed to take into account his whole service in local government. In *Reg.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex parte Hierowski*[31] the Tribunal, in reducing the rent, took into account afresh the reasonableness of the amount charged, which was an extraneous consideration, as they should only have had regard to the change of circumstances. In *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore*[32] the Tribunal, in assessing compensation for industrial injury, took into consideration only the injury to the left eye and failed to take into account the prior injury to the right eye. In *Reg.* v. *Head*[33] the Secretary of State, in ordering the girl to be detained, failed to consider whether it was required for the protection of others. In *Reg.* v. *Liverpool Justices*[34] the justices, in making the adoption order, failed to consider whether there were special circumstances justifying it. In all those several cases it was held or accepted that certiorari lay to quash the decisions. In a case in the Privy Council, *Seereelall Jhuggroo* v. *Central Arbitration and Control*

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[27] [1915] 2 K.B. 466, 475; 31 T.L.R. 329.

[28] [1909] 2 K.B. 1045; 25 T.L.R. 795; (C.A.) [1910] 2 K.B. 165; 26 T.L.R. 422; (H.L.) [1911] A.C. 179; 27 T.L.R. 378.

[29] (1948) 64 T.L.R. 73; [1948] 1 All E.R. 218.

[30] [1951] 1 K.B. 711; (C.A.) [1952] 1 K.B. 338.

[31] [1953] 2 Q.B. 147; [1953] 2 W.L.R. 1028; [1953] 2 All E.R. 4.

[32] [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; [1957] 1 All E.R. 796.

[33] [1958] 1 Q.B. 132, 138.

[34] [1959] 1 W.L.R. 149; [1959] 1 All E.R. 337.

Board,[35] the principle was accepted but certiorari was refused because the Board were held not to have taken extraneous matter into account.

In some of those cases it has been said that the tribunal, in falling into an error of this particular kind, has exceeded its jurisdiction. No tribunal, it is said, has any jurisdiction to be influenced by extraneous considerations or to disregard vital matters. This is good sense and enables the court of Queen's Bench to receive evidence to prove the error. But an *excess* of jurisdiction in this sense is very different from *want* of jurisdiction altogether which is, of course, "determinable at the "commencement, not at the conclusion of the inquiry" (see *Reg.* v. *Bolton*[36]). Whereas an excess of jurisdiction is determinable in the course of or at the end of the inquiry. But allowing that a tribunal which falls into an error of this particular kind does exceed its jurisdiction, as I am prepared to do, nevertheless I am quite clear that at the same time it falls into an error of law too: for the simple reason that it has "not deter-"mined according to law." That is, indeed, how Blackburn J. put it in *Reg.* v. *De Rutzen*.[37] And the decision in the *Northumberland* case[38] itself shows that, even though no evidence is given, nevertheless if such an error appears from the documents properly before the court, or by legitimate inference therefrom, then certiorari may be granted to quash the decision: and the certiorari can properly be said to be for error of law on the face of the proceedings. It may be excess of jurisdiction as well, but it is certainly error of law.

In the present case, it is, I think, a legitimate inference, from the documents properly before the court, that the tribunal, when it came to give its written and only decision, failed to take into consideration alternative (D), which was a vital matter for consideration. It was the sole ground on which the superintending examiner had decided the case: and, before reversing his decision, the tribunal ought to have considered it. The failure to take it into consideration is, I think, a ground on which certiorari *may* be granted. But should it be? The general rule is undoubted that the issue of certiorari is a matter of discretion for the High Court. This was distinctly stated by the court of King's Bench in 1793 in *Rex* v. *Bass*[39] and again in 1838 in *Reg.* v. *Manchester & Leeds Railway Co.*[40] Since that time a subsidiary rule has been laid down to the effect that where the applicant is a party grieved, who has no other remedy, the court will grant it ex debito justitiae, see *Reg.* v. *Surrey Justices*[41]; *Reg.* v. *Manchester Legal Aid Committee*.[42] But if he is not a party grieved, or if, being a party grieved, he has another remedy, as, for instance, by appeal, then the discretion of the court remains intact to grant or refuse the order, see *Rex* v. *Harman*[43]; *Rex* v. *Cambridgeshire Justices*[44]; and this is the ground on which I would uphold the decision in *Davies* v. *Price*.[45]

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[35] [1953] A.C. 151, 161.
[36] (1841) 1 Q.B. 66, 74.
[37] (1875) 1 Q.B.D. 55, 57.
[38] [1952] 1 K.B. 338.
[39] (1793) 5 T.R. 251.
[40] (1838) 8 A. & E. 413, 428.

My Lords, I have come to the conclusion that this is not a case in which certiorari should issue. The effect of a special reference under section 9 (1) of the Patents Act, 1949, is very limited. It is interlocutory in its nature. Even when made, it does not give the appellants any greater rights than they had before. It is more a detriment to the respondents than a benefit to the appellants. It serves as a notice to the public that there is a substantial risk of infringement. But it decides nothing as to whether there is in fact an infringement. That must still be decided in an action brought for the purpose. This was, I expect, the reason why Parliament did not think it a proper case in which to give a right of appeal to one side or the other. It left a person aggrieved to his other remedy—the new patentees could make the article and the old patentees could sue for infringement—and only then would they know for certain where they stood. And this, I must say, seems to me to be the proper remedy rather than to apply for a certiorari. I am prepared to assume that the appellants are persons aggrieved, but, as they have another remedy open to them, the court in its discretion should refuse a certiorari.

I would add this too. When the appellants saw that the tribunal had overlooked alternative (D), they might well have gone back and pointed out the error. I have no doubt that the tribunal would then have dealt with alternative (D). It might indeed have made a different order, if it thought fit to do so. It used to be competent for quarter sessions to do this if the error was brought to their notice during the same sessions, see *St. Clement's Parish* v. *St. Andrew's Parish, Holborn*.[46]

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[41] (1870) L.R. 5 Q.B. 466.

[42] [1952] 2 Q.B. 413; [1952] 1 T.L.R. 476; [1952] 1 All E.R. 480.

[43] (1739) 2 Sess.Cas.K.B. 201.

[44] (1835) 4 A. & E. 111, 123, 124. 125.

[45] [1958] 1 W.L.R. 434, 442; [1958] 1 All E.R. 671.

[46] (1704) 6 Mod. 287; 2 Salk. 606.

So, also, it might have been done by this tribunal if brought promptly to its notice. No more could be achieved by certiorari and mandamus. I do not know why the appellants did not do this, except perhaps that they did not think of it.

At any rate, having regard to those courses which were open to the appellants, it is not, in my opinion, a case in which certiorari should issue. On this ground, therefore, I would dismiss the appeal.

One word more. It was suggested that certiorari should be limited in view of the statutory facilities which now exist for appeals on law. But I would remark that it was only last year, by section 9 of the Tribunals and Inquiries Act, 1958, that these new statutory facilities were introduced and they only apply to a limited number of tribunals. There still remain a considerable number of tribunals and inquiries where there is no appeal: and in most of these cases Parliament has expressly provided that reasons shall be given with the very object that they should be subject to control by certiorari. Hence the reference to " the record " in section 12 (3) of the Act. In any case, the Act does nothing to limit the scope of certiorari, and I should be sorry to see so beneficial a remedy cut down or limited at this point in time. There is nothing more important, to my mind, than that the vast number of tribunals now in being should be subject to the supervision of the Queen's courts. This can only be done if the remedy by certiorari is maintained in the full scope which the great judges of the past gave to it. Any anxiety about an undue extension of the remedy is fully met by the knowledge that, in cases where there is a right of appeal, the courts may in their discretion refuse the order. When there is no right of appeal, this historic remedy has still a valuable part to play: or at any rate, it should have, if we wish any longer to ensure that the rights of the people are determined according to law.

Appeal dismissed.

Solicitors: *Parker, Garrett & Co. for Burdekin & Co., Sheffield; Bristows, Cooke & Carpmael.*

F. C.

[HOUSE OF LORDS.]

H. L. (E.)* GOUGH . . . . APPELLANT;

AND

NATIONAL COAL BOARD . . . . . RESPONDENTS.

1959
Mar. 9, 10,
11, 12;
April 16.

Mines and Minerals—Coal—Breach of statutory duty—Roof and sides—Fall of coal from coal face—Duty to make secure side of working place—Whether coal face a "side"—Meaning of "secure"—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 49.

House of Lords—Retrial—No finding by judge on one issue—Question of fact—Point reserved but not argued—Retrial refused.

By section 49 of the Coal Mines Act, 1911: "The roof and sides "of every travelling road and working place shall be made secure, "and a person shall not, unless appointed for the purpose of explor-"ing or repairing, travel on or work in any travelling road or "working place which is not so made secure."

By section 102 (8): "The owner of a mine shall not be "liable to an action for damages as for breach of statutory duty in "respect of any contravention of or non-compliance with any of the "provisions of this Act if it is shown that it was not reasonably "practicable to avoid or prevent the breach."

A ripper was employed by the mine owners at a coal face worked on the "long wall" system. While walking along the coal face he was injured by a large lump of coal which was dislodged from the top of it. In an action against the mine owners for damages he alleged breach by them of the statutory duty imposed by section 49. The mine owners contended that the coal face was not a side of the working place within section 49, and also relied on section 102 (8). The trial judge having found in their favour on the first point, they did not require him to give a decision on the second. The Court of Appeal having affirmed his decision, the ripper appealed to the House of Lords:—

Held, that the coal face was a "side" of a working place within section 49 and, that, accordingly, the mine owners were in breach of their statutory duty in failing to make it secure. Section 49 must be applied subject to the fact that the object of mining was to get coal, and could not be construed so as to compel the support of that which was to be brought down, but the sides, including the coal face, must be made "secure" in the sense that there would be no danger from accidental or unintended falls.

Elliot v. *National Coal Board,* 1956 S.C. 484 overruled.

Held, further (Lord Morton of Henryton and Lord Somervell of Harrow dissenting), that on the second issue the case should not be

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* *Present:* LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER, LORD SOMERVELL OF HARROW and LORD DENNING.

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sent back for a retrial. The respondents sought to rely on section 102 (8) and must prove their case. The respondents had not required the trial judge to make a finding and they must accept as it stood the evidence, on which it could not be held that they had discharged the onus on them.

Decision of the Court of Appeal [1959] 1 Q.B. 189; [1958] 2 W.L.R. 735; [1958] 1 All E.R. 754 reversed.

APPEAL from the Court of Appeal (Lord Goddard C.J. and McNair J., Morris L.J. dissenting).

This was an appeal by the appellant, Richmond Gough, who was plaintiff in the action, from an order of the Court of Appeal dated February 28, 1958, whereby a judgment given on June 21, 1957, by Salmon J. in favour of the respondents, the National Coal Board, who were defendants in the action, was affirmed.

The facts found by Salmon J. were as follows: "The plaintiff "in this case, Richmond Gough, was an underground worker in "the defendants' coal at the Granville Colliery. He was "employed there as a ripper, and had many years' experience "underground at the time of the accident. He met with an "accident on the day shift on December 2, 1955, in circum-"stances which I shall, in a moment, describe. At this pit "there was a coal face known as D panel double face, and it was "being worked on what is described as a long wall system. "There was, I find, 150 yards of this coal face approximately "six feet high being worked in the mine. Prior to the accident "the system had been to have three shifts. There was what "is known as the afternoon shift, which worked approximately "from three till ten-thirty p.m., and which was known as the "cutting shift. During that shift a cut by mechanical cutter "was made into the face of the seam to a depth of about four and "a half feet, and the cut was about six inches from the ground. "The second shift was the night shift, which came on at about "ten-thirty in the evening until seven o'clock in the morning. The "function of that shift was filling off; that is to say, their job was "to win and bag the coal that had been cut by the afternoon "shift. Then the third shift was known as the day shift. It came "on at about seven o'clock in the morning and worked till about "three in the afternoon. That shift had the job of advancing the "rails and the roof and generally clearing up after the night shift. "The plaintiff was a member of the third shift, the day shift. "On the day in question, December 2, 1955, it appears that owing "to some fault in the conveyer the night shift had not completed

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"the task of filling off the coal, and the deputy in charge of the "day shift, a man called Reece, decided—and rightly decided—"to complete their task. He detailed the plaintiff, amongst "others, to go along the face and help fill off the coal. I find "that the plaintiff came along what has been described as the "approach road, which is shown on Exhibit P.1, turned to his "right and walked along the face for a distance of about 50 "yards. He was walking about four feet from the face of the "coal. After he had gone a distance of 50 yards, or thereabouts, a piece of coal about 12 feet long by two feet six "inches thick came away from the top of the coal face. I find "that it came away from a point two feet six inches from the "roof. He was buried by this coal and suffered quite a serious "injury."

Gerald Gardiner Q.C. and *A. E. James* for the appellant. There is no reason for restricting the meaning of the word "sides" in section 49 of the Coal Mines Act, 1949. A corridor has two sides to it. A room has four sides. If a room is being painted it is the working place and the side on which the men are working does not cease to be a side. So here, the coal face is a "side."

The Coal Mines (Support of Roof and Sides) General Regulations, 1947 (S.R. & O. 1947, No. 973) provide for this matter. Under the regulations and under section 50 of the Coal Mines Act, 1911, the manager made support rules. See also sections 51 and 52.

It is not intended to keep the coal face secure, because that cannot be done, but to make it secure. Everything done at the coal face is done for a limited period to make it temporarily secure. Section 102 (8) gives relief to the respondents so that the onus on them is not as heavy as it would otherwise be. "Secure" in section 49 means "safe," not permanently immovable. Section 64 was altered by regulation 5 of the Coal Mines (Officials and Inspections) General Regulations, 1951 (S.I. 1951, No. 848).

As to the meaning of the word "secure" in section 49, and the proper approach to section 102 (8), see *Edwards* v. *National Coal Board.*[1] See also *Marshall* v. *Gotham Co. Ltd.*[2]; *Boyd* v. *National Coal Board*[3]; *Penny* v. *National Coal Board*[4]; *Walsh*

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[1] [1949] 1 K.B. 704, 708–709, 712; 65 T.L.R. 430; [1949] 1 All E.R. 743.

[2] [1954] A.C. 360, 369–370, 372–373, 374–375, 376; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937.

[3] (1954) unreported, Dec. 14 (Jones J. at Swansea Assizes).

[4] (1955) unreported, Jan. 27 (Byrne J. at Newcastle-upon-Tyne Assizes).

v. *National Coal Board* [5]; *Green* v. *National Coal Board* [6]; *Elliot* v. *National Coal Board* [7] and *Young* v. *National Coal Board*,[8] in which this question has arisen. The cases in which the coal face was held not to be a " side " were wrongly decided.

The real object of section 49 is to provide against unintentional falls. The word " secure " does not imply the quality of permanence, and the section applies to the face of the working place. The respondents were in breach of their duty under it. There were reasonably practicable steps which the respondents could have taken to minimise the known risks to which the appellant was exposed.

To limit the scope of section 49 as is suggested would deprive coal miners of the protection afforded by it at the very place where the danger is greatest. As mining operations proceed the working places change and security must be provided at each stage.

A. E. James following. At common law the owner of the soil and the minerals has a right to take out the minerals, but if he does so by means of someone else's services, he owes a duty to him which is at its highest when there is great risk and the consequences may be fatal and severe. It is against this background that the legislature passed the provisions consolidated in the Act of 1911.

The miner, when working, is surrounded by " sides " and " faces," and " sides " in sections 49 and 50 cannot be put in contradistinction to " faces." " Face " has a prescribed meaning which has nothing to do with its position in relation to the workman. It means " the exposed surface from which coal . . . " is won " (see regulation 13 (1) of the regulations of 1947). That could include the floor or the roof.

On the meaning of the word " secure " reliance is placed on what Morris L.J. said in the Court of Appeal in the present case.[9] As to what McNair J. said in the Court of Appeal [10] about a " condition of stability which will ordinarily result in safety," the word " ordinarily " may create confusion if it is taken to mean that the duty to make safe is only related to ordinary hazards. The requirement of making secure does not prohibit the getting of coal, but concurrently with that the miner can have "security" in his surroundings.

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[5] [1956] 1 Q.B. 511, 520; [1955] 3 W.L.R. 829; [1955] 3 All E.R. 632.

[6] (1955) unreported, Dec. 20 (Oliver J. at Leeds Assizes).

[7] 1956 S.C. 484.

[8] (1956) unreported, July 5 (Court of Session, Lord Wheatley).

[9] [1959] 1 Q.B. 189, 197; [1958] 2 W.L.R. 735; [1958] 1 All E.R. 754.

[10] [1959] 1 Q.B. 189, 200.

All that the appellant had to do here was to satisfy the judge that section 49 applied to the seam from which this coal fell, that the coal did fall and that because it fell the place could not have been "secure." The respondents were under the onus of showing that the fault was undetectable, and that they had no reason to expect it.

As to whether the standard of care in relation to section 49 is the same as at common law, see *Marshall* v. *Gotham Co. Ltd.*[11]

John Thompson Q.C. and *George Mynett* for the respondents. The appellant does not enjoy any advantage under section 49 which is not enjoyed by other men at the coal face. A coal face on which work is being done is not a "side," whether or not it may be a side in other circumstances. One cannot divorce a "working place" from the work which makes it a working place.

The Act of 1911 was passed for a particular industry, unlike the Factories Acts, which are quite general. It is improbable that the true construction of this Act renders illegal the activity of extracting coal, which is the whole object of mining. It is hard to bring oneself within the protection of the proviso at the end of section 75 of the Act: see *McCarthy* v. *Lewis.*[12] It is not suggested by the respondents that one cannot have a side or a roof of coal, or that the Act affords no protection to workers at the coal face.

Section 49 requires the respondents to make the roof and sides "secure." That is a description of a physical condition which must be achieved and not merely attempted. That which has to be made secure must remain secure so long as it is the roof or side of a travelling road or working place. If and when it ceases to be such the requirement ceases to apply: see *Marshall* v. *Gotham Co. Ltd.*[13] That condition must continue throughout the time that the men are travelling or working and is not confined to making a condition before they start working. The true view is that the obligation to make secure denotes a contemplation of the intended activities, and it is required that the roof and sides shall be made secure against the incidents which must be taken into account, having regard to the purpose of the road or working place. In relation to travelling roads the duty is the same as for working places. The travelling roads do not only have to be made secure, they have to be kept secure. Section 49 does not contemplate a collier who has disturbed the continuity of the coal face staying after he has done so. The alternative is between security and insecurity.

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[11] [1954] A.C. 360, 376–377.

[12] [1957] 1 Q.B. 475; [1957] 2 W.L.R. 300; [1957] 1 All E.R. 556.

[13] [1954] A.C. 360, 371, 374–375.

The coal face is not the " side " of a working place within the meaning of section 49; it is the working place itself. A " side " as something bounding an area is comprehensible, but a " side " as being something one is working on for the very purpose of removing it is not comprehensible. The subject-matter of section 49 is an area which has boundaries within which the work is done, but the sides cease to be sides when one starts to break them down.

If the coal face must be made secure, is there an obligation to place supports there in the hope that security will follow and, if so, when does that obligation arise? Until these aspects of the supposed duty are specified it is hard to do more than set one general construction of the obligation against another. If section 49 was applicable to the coal face, it would be no excuse for such a fall as this that all the relevant support rules under section 50 of the Act had been complied with, since the obligation to make secure is peremptory. The duration of the security required should be the same as the duration of the use of the working place. The approach of Morris L.J. in the Court of Appeal leaves it uncertain what the obligation is. If a miner, picking at his stint, dislodges without negligence a piece of coal which falls on his neighbour, the injured man cannot complain that there has been a breach of section 49. It is hard to grasp the conception that while the getting of coal is not prohibited the miner must concurrently have this form of security in his surroundings. What he can have is such protection as care in placing supports will give him.

Security is a material condition. The duration of that material condition may vary. But during that time the roof and sides must be in such a condition that they will not give way by reason of the operations performed in relation to them. They must be made and kept secure so long as the place is a working place.

To make " secure " does not mean to put a side in such a condition that it could not be knocked down. In mining it must be permissible to send men to knock down the coal face. Therefore, that which they are knocking down is not a side of their working place. It has not been shown that section 49 could be applied to the face during coal getting, or explained how that which the work is designedly causing to cease to exist as a side may be regarded as a side which has to be kept secure, and from which the workman must stay away at any time when it is not secure. One must keep distinct the conceptions of the requirement to use material things like props with a certain object, and the actual achievement of the prescribed result which is the physical condition of security under the obligation to make secure.

There is a heavy burden of proof on the respondents: see *Edwards* v. *National Coal Board.*[14]

See also section 86 of the Act as to the object of regulations made under it.

There is here no finding on the point under section 102 (8). If the respondents are wrong on their contentions under section 49, there is enough in the evidence to bring them under that subsection on the ground that it would not have been feasible to take precautions to prevent this fall.

Gerald Gardiner Q.C. in reply. As to the onus of showing that reasonably practicable steps have been taken, see *Marshall* v. *Gotham Co. Ltd.*[15]

As to " secure," see the definition in the Shorter Oxford English Dictionary, which shows that it has in it an element of safety and an element of stability. See also *per* Lord Tucker in *Marshall's* case.[16] The word here means " free from the danger " of unintended falls."

The word " roof " is used throughout the Act as indicating that which is above the men's heads and under which they must work or travel. The word " side " means any exposed boundary of a working place or travelling road which is a vertical support of the roof. The word " end " is unknown in the Act or the regulations. The respondents' submission as to the meaning of " side " produces insoluble complexities.

If it was reasonably practicable to make the working face secure, the men should have been protected from unintended falls from the roof and sides. There was no evidence that it was not reasonably practicable to avoid a breach of section 49.

Their Lordships took time for consideration.

April 16. Lord Morton of Henryton. My Lords, in this case the appellant, plaintiff in the action, claims damages for breach of statutory duty by his employers, the respondent board.

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[14] [1949] 1 K.B. 704, 708–709.

[15] [1954] A.C. 300, 370, 374.

[16] Ibid. 374–375.

Alternatively he claims damages for negligence at common law. The statutory duty in question is imposed by section 49 of the Coal Mines Act, 1911. This section is the first of a group of four sections which appear under the cross-heading "Support of Roof "and Sides" and is as follows: "The roof and sides of every "travelling road and working place shall be made secure, and a "person shall not, unless appointed for the purpose of exploring "or repairing, travel on or work in any travelling road or working "place which is not so made secure." With this section should be read section 102 (8) of the Act, which provides: "The owner "of a mine shall not be liable to an action for damages as for "breach of statutory duty in respect of any contravention of or "non-compliance with any of the provisions of this Act if it is "shown that it was not reasonably practicable to avoid or prevent "the breach." Section 50 (1) and (2) of the Act should also be quoted. They are as follows: "(1) Where props or props and "bars or chocks are used to support the roof at the working face, "the roof under which any work of getting coal or filling tubs is "carried on shall be systematically and adequately supported, and "the props or chocks shall be set at such regular intervals and in "such manner as may be specified in the notice hereinafter men-"tioned. (2) Holing props or sprags shall be set as soon as "practicable, and shall be set at such regular intervals and in "such manner as may be specified in the notice hereinafter "mentioned, and shall not be removed until the coal is about to "be taken down and before the roof supports (if any) have been "advanced in the manner specified in the notice."

[His Lordship stated the facts and continued:] The first question arising for decision by the learned judge was whether the coal face, from which this large piece of coal fell, was a "side of a working place" within the meaning of section 49 of the Act. If so, it was clear that it had not been "made "secure," since the fall occurred. The learned judge held [1] that "this section cannot be intended to apply to the coal face because "the whole object of mining is to take down the coal face; there-"fore, a section that refers to an obligation to make secure the "sides of a working place, and prohibits anyone from working in "such a place which has not been so made secure, cannot, in my "judgment, be intended to apply to the coal face itself." He then reviewed the evidence and held that the board had not been negligent and dismissed the action, but assessed the damages at

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[1] [1957] 1 W.L.R. 973, 975; [1957] 3 All E.R. 368n.

Lord Morton of Henryton.

£600, if they had been recoverable. The Court of Appeal, by a majority (Lord Goddard C.J. and McNair J., Morris L.J. dissenting), affirmed the decision of the learned judge on both points.

My Lords, to my mind the question whether a working coal face can be a " side " within the meaning of section 49 of the Act of 1911 is one of great difficulty. The view that it cannot was powerfully put by Lord Cameron in *Elliot* v. *National Coal Board*,[2] and by McNair J. (with whose judgment Lord Goddard agreed) in the present case. In the end, however, I came to the contrary conclusion, and I was in course of putting my reasons on paper when I had the privilege of reading in print the speech which is about to be delivered by my noble and learned friend, Lord Reid. I entirely agree with his reasoning and conclusion on this point, and I shall not detain your Lordships by stating the same reasons in different words. In my opinion, the coal which injured the appellant fell from a " side " of a " working place " and there was a breach by the board of its statutory duty to make that side secure. This being so, the question arises whether it has been shown by the board that " it was not reasonably practicable to " avoid or prevent the breach " within section 102 (8) of the Act. Paragraph 4 of the defence of the board was in the following terms: " If (contrary to their contention) the defendants were in " breach of their statutory duty, they will rely upon section 102 " (8) of the said Act that it was not reasonably practicable to " avoid or prevent such breach." The board was asked to give, and did give, particulars under this paragraph. Salmon J. made no finding upon this point, which did not arise because he held that there had been no breach of statutory duty by the board. The point had to be dealt with, however, by Morris L.J., since he thought, as your Lordships do, that there had been a breach of section 49. That learned Lord Justice expressed the view that there should be a further hearing, presumably by the learned trial judge, in order to decide the question arising on section 102 (8). My Lords, I entirely agree with that view. Your Lordships are all of opinion, as I am, that the evidence failed to establish a case of common law negligence against the board. Thus the result of this appeal depends entirely on the question whether or not it was reasonably practicable to avoid or prevent the breach of section 49 which resulted in injury to the appellant. If the answer is " Yes " the appeal succeeds and the appellant is entitled to £600 damages. If the answer is " No " the appeal should be dismissed.

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[2] 1956 S.C. 484.

This question is one of fact for the learned trial judge, on which oral evidence, conflicting to some extent, was given before him, but it did not become necessary for him to express an opinion upon it. I cannot attach blame to the board or its counsel for failing to ask the judge to determine a question which did not arise in view of his decision on other points, and he might quite properly have refused to determine it. It is, in my view, impossible to say what view he would have formed on the question arising on section 102 (8), and that question now comes, for the first time, into the forefront of the case.

I would remit the case to the learned trial judge to find whether or not it was reasonably practicable for the board to avoid or prevent the fall of coal whereby the appellant suffered damage. As I take this view, it would not be right for me to make any comment upon the evidence bearing upon this issue.

No final order should be made on this case until the learned judge has made this further finding.

LORD REID. My Lords, this is an action for damages for injuries sustained by the appellant on December 2, 1955, in Granville Colliery, Shropshire. The appellant's injury was caused by a large piece of coal falling on him while he was walking along the coal face. The depth of the seam at this point was about six feet and the face was about 150 yards long. It was being worked on the long wall system with coal cutters. The work was done by three shifts, the cutting shift under-cut the coal, then the filling shift brought down the coal which had been under-cut and removed it by a conveyor, and then the ripping shift made the necessary preparations for the next cutting shift.

The appellant was working on the ripping shift. On this occasion, owing to some difficulty with the conveyor, the filling shift had not completed their work and this had to be finished by the ripping shift before their normal work could start. The appellant had been told to go along the face to a point where he was to bring down some of the coal which had been left there. It was on this journey that he was struck by the piece of coal which injured him. It fell from some point on the face.

The appellant alleged both breach of statutory duty and negligence at common law. He failed on both grounds at the trial before Salmon J. and his appeal was dismissed by the Court of Appeal (Lord Goddard C.J. and McNair J., Morris L.J. dissenting). On the first ground breach of section 49 of the Coal Mines

Act, 1911, is alleged. [His Lordship read the section and continued:]

Admittedly, the place where the appellant was walking when he was injured was a working place within the meaning of this section, and his case is that the face from which the coal fell was a "side" of that working place within the meaning of the section, and that that "side" had not been made secure as the section required. It is well established that the duty under section 49 is an absolute duty, so, if on a proper interpretation the face was a "side" of the working place at the time when the accident occurred, this appeal must succeed unless the respondents can establish the statutory defence to which I shall refer later; but if the face was not a "side" within the meaning of the section, the appellant could only succeed if negligence has been proved. The reasoning which led the majority of the Court of Appeal to hold that the face was not a "side" is briefly and clearly stated by McNair J.[3]: "It seems to me to be wholly "unrealistic and artificial to say that, when a man is employed "to bring down a face of coal in front of him, that face of coal "is the side of a working place which has to be made secure, "when the whole object of the operation is to make it insecure. "The fallacy in the plaintiff's argument seems to me to lie in the "false assumption that every working place underground has a "roof and four sides. In truth, the coal face upon which he is "operating is part of his working place itself and does not cease "to be part of his working place if, in the process of breaking in, "he makes a hole in the face and then proceeds to work either "way to the boundaries of his stint. No doubt in the progress "of his work at the face, he will, according to prudent mining "practice, insert props and sprags to provide temporary security "from the risk of falls from above him or from his sides, but "such props or sprags would not be put up in discharge of the "defendants' obligation to make the roof and sides of the working "place secure. The cutter who makes the initial cut in the face, "thus rendering the face insecure, his mate who inserts the "holing props under the uncut coal, the shot firer who in cases "of necessity still further reduces the stability of the face, are all "working in a working place, but it would be absurd, as I see it, "to hold that the statute imposes upon the defendants in all "those cases the absolute obligation of making the face secure."

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[3] [1959] 1 Q.B. 189, 202–203; [1958] 2 W.L.R. 735; [1958] 1 All E.R. 759.

There are also a number of fairly recent unreported cases and one reported case (*Elliot* v. *National Coal Board*[4]), in all but one of which a similar decision was reached for similar reasons. The exception was *Penny* v. *National Coal Board*,[5] January 27, 1955, where Byrne J. held that the face was a "side." He said: ". . . at all times there will be maintained in that place where he "works four sides, one of them being the coal that he is cutting "out. It seems to me that if any other construction were to be "put upon this section it would follow that so far as the coal face "of any mine is concerned—and I think the evidence in this case "was that the coal face was about 90 yards long—could be left "without any support of any kind without committing a breach "of the statute."

At first sight the reasoning of McNair J. is convincing, but on further consideration I have come to think that it is inadequate to deal with a variety of cases that can arise under the section, and that it proceeds on a misinterpretation of the word "secure." The argument was put by counsel in the form that the section requires you not to send men to knock down anything to which the section applies and, therefore, if a face has to be brought down, the section cannot be applied to it. I would agree with this argument to the extent that Parliament cannot have intended altogether to prevent the winning of coal, and that nothing in the Act can be read in such a way as to produce this result. But before coming to what I think is the true interpretation of the section, I think it well to look at some of the consequences of reading it in the way in which it has been read.

First, let me take the face at a time when it has not been undercut and when no work has been done on it. On the long wall system that will normally be the position during the ripping shift. Men will be moving the conveyor adjacent to the face and their working place, which I may call a long gallery, will be bounded on one hand by the face and on the other by the waste. Stone or other material will have been packed in the waste, and, if a piece of that material falls on a man and injures him, undoubtedly there is a breach of section 49, but according to the respondents' original argument—it was somewhat modified in this House—the statute does not apply if a piece of coal falls from the face because the face is not a "side" of the working place. If it is not a "side" for the purposes of section 49, it cannot be a "side" for the purposes of any of the other statutory safety provisions, not even for the provisions requiring inspection, and it would seem to me to require very strong reasons to justify such a conclusion.

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[4] 1956 S.C. 484.

[5] (1955) Unrep. (Newcastle-upon-Tyne Assizes).

Then let me take the method of working known as pillar and stall or stoop and room. There large pillars of coal are left unworked and the miner works forward getting out the coal between the pillars. He will then have in front of him the face on which he is working and on either side one of these pillars. Are the faces of these pillars to be regarded as sides of his working place? It may be intended to work the faces of the pillars at some future time, but I would find it impossible to hold that they are not " sides " of his working place merely for that reason, and if a face, which in the ordinary use of the language would be called a " side," does not cease to be a " side " because it is to be worked in the more distant future, why should it cease to be a " side " because it is to be worked tomorrow? The need for safety provisions is just the same.

Finally, let me take the roof. It appears to me that the statutory obligation to make secure must be of the same character with regard to roofs as it is with regard to sides. As I have said, the argument is that section 49 prohibits sending men to bring down anything which it requires to be made secure. But the evidence in this case shows that every day travelling roads must be advanced as the face recedes. These roads have a higher roof than what I have called the gallery along the face, and to advance a travelling road it is necessary to bring down a part of the roof of that gallery. And there are other cases where it may be necessary to bring down a roof. Can it be said that a part of a roof which has to be brought down in the immediate future is not within the protection of section 49, or can it even be said that it ceases to be a roof as soon as work preparatory to bringing it down begins? I did not understand it to be argued that there never could be a working place under or nearly under a roof on which such preparatory work had begun, and if this is so, then, again, statutory protection ceases when it is most necessary.

I see nothing to prevent a face or roof being within the protection of section 49, at least down to the time when work with a view to bringing it down begins. Does it then cease at that time to be a side or roof within the meaning of the section? If it did there was no breach of the section in this case, because the face from which the coal fell had already been under-cut before the accident. But the consequences of this view would be a very severe limitation of the scope of the statutory provisions of the

Act, and I do not think that we are driven to an interpretation which would have that result.

In my judgment, the respondents' argument involves an erroneous assumption as to the meaning of the word " secure " in this context. The purpose of this part of the Act is to prevent accidents, and, to my mind, " secure " here means in such a state that there will be no danger from accidental falls. The word cannot mean in such a state that the side or roof will stand up against deliberate attack, for no part of a mine can be secure in that sense. I can see nothing inconsistent in saying that a side or roof shall be made secure against accidental falls at a time when steps are being taken to bring it down deliberately. Indeed, the evidence in this case was that proper mining practice requires that great care should be taken at that stage, and the statute is not silent on that matter; for example, section 50 (2) prescribes precautions to be taken at that stage. The appellant's case at common law is that in fact insufficient precautions were then taken.

It may be that it is more difficult to make the face secure after working on it has begun, but that is a very different thing from saying that Parliament cannot have intended the provisions of section 49 to continue to apply during the progress of such work. It may be that such work will cause an accidental fall greater than was intended, and that this could not have been prevented. Absolute liability in such a case might seem unreasonable, and so it would be if it was unqualified, but section 102 (8) qualifies these absolute duties. It provides: [His Lordship read the subsection and continued:] Under the earlier legislation there was no absolute duty; for example, section 49 of the Coal Mines Regulation Act, 1887, sets out rules to be observed so far as reasonably practicable, and one of these, namely, rule 21, was in terms identical with those of section 49 of the 1911 Act. I doubt whether the change of form with regard to civil liability made any real change of substance, and any apparent difficulty about the existence of an absolute liability to make a face secure while it is being brought down is, I think, met by the provisions of section 102 (8).

In this case, the respondents seek to rely on section 102 (8), but they are under the handicap that their evidence does not appear to have been led with the requirements of this subsection in view, and the trial judge was not asked to make any finding under it. If the respondents sought to rely on section 102 (8) it was for them to prove their case. I agree with those of your

Lordships who are of opinion that no order or finding in favour of the respondents should be made on this matter and that this defence fails.

The respondents are, therefore, in my judgment, liable in damages in respect of a breach of section 49, and it is unnecessary to deal with the appellant's case at common law. Salmon J. said that he would assess the total damages at £600. This appeal ought, therefore, to be allowed, and £600 damages should be awarded to the appellant with costs.

LORD TUCKER. My Lords, the question for decision on this appeal is whether the working face in a coal mine is "a side" within the meaning of section 49 of the Coal Mines Act, 1911. [His Lordship read the section and continued:] Including the judges who have dealt with this particular case this question has been the subject of consideration by nine different judges, two Scottish and seven English, which has resulted in a majority of seven to two in favour of the view that a working face is not a side within the meaning of the section. It is true that in two of these cases the question was not the subject of actual decision. The basis of these decisions can be summarised by reference to the judgment of Lord Cameron in the Outer House in the case of *Elliot* v. *National Coal Board*[6] in which he said: ". . . the whole purpose of the longwall method of mining is to "cut coal by advancing the face and to do so by progressive "destruction and removal of the face itself, a process which is the "complete antithesis of supporting and making the face secure "and . . . consequently the condition as well as the function of "the face in longwall working is totally different from that of the "sides proper or the rear or waste of the working place."

This reasoning, which commended itself to Salmon J., the trial judge in the present case, and to Lord Goddard and McNair J. in the Court of Appeal, seemed to me so much in accord with common sense that I would have accepted it had I not been persuaded to the contrary view in the course of the hearing of this appeal.

My reasons can be quite shortly stated. The word "side" must, I think, have a geographical connotation. It cannot be a side at one moment and not a side at another. It seems to me impossible to say that the face is not geographically a side between shifts when, as in the present case, the working place is being used as a thoroughfare by men proceeding to their places for the third shift to make the necessary preparations for the next cutting of the face by the cutting shift. What, then, is the solution of the dilemma? It lies, I think, in the meaning of the word "secure." Security from what? I would say security from accident or unintentional collapse or falls, as distinct from security from the natural consequences of the deliberate assaults inherent in the operation of mining to which both the face and the roof are subjected from time to time.

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[6] 1956 S.C. 484, 486–487.

In *Marshall* v. *Gotham Co. Ltd.*[7] I had occasion to refer to the word "secure" in a regulation identical with section 49 and said: "I agree that the word 'secure' does not "involve security from the effects of earthquake or an atom "bomb, but I think it must include security from all the known "geological hazards inherent in mining operations." I do not desire to qualify in any way what I said in that case but would only observe that deliberate assault on the mine face was not within my contemplation as a geological hazard.

For these reasons I agree that the appeal succeeds.

With regard to the order for a new trial as to whether the respondents could rely on section 102 (8) which Morris L.J. would have ordered, I am of opinion that such an order should not be made in the present case. The trial judge was not asked to make a finding on this issue and the matter was not even argued before him, counsel contenting himself with formally taking the point so as to preserve his position on appeal. In these circumstances, I think counsel must accept the evidence as it stands and content himself with endeavouring to persuade your Lordships that on such evidence the respondents have discharged the onus that lies on them under section 102 (8) and so far as I am concerned he has not succeeded in so doing. I would therefore allow the appeal and enter judgment for the appellant for the sum of £600 as assessed by the trial judge.

Lord Somervell of Harrow. My Lords, can a working face, at any rate when any part of it is being worked on, be a "side" within section 49 of the Coal Mines Act, 1911? I think the Act itself gives the answer "Yes." I read section 50, not as widening the ambit of that which has to be supported or made secure, but as applying the special procedure of specification in a notice to certain of the measures which are covered by the

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[7] [1954] A.C. 360, 374–375; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937.

Lord Somervell of Harrow.

general words of section 49. As section 50 (2) deals with the measures which are to be taken after a working face has been undercut it follows that a working face being worked on is within section 49.

This view is confirmed by the cross-heading, though I do not base my opinion on it. If I am wrong and there is no ground for restricting section 50 to measures within section 49, section 50 (2) at any rate shows that the words " shall be made secure " can have application to a working face because the purpose of the holing props or sprags is to make secure. The trackway down which the plaintiff was walking when the accident happened is, according to the plan in evidence, nearly 100 yards long and eight to 10 feet wide. The working face is a side of the trackway in the ordinary sense of the word. The trackway is a working place. It was common ground that it is not a travelling road.

The difficulty arises from the fact that the duty imposed by section 49 is one of support and the object of a coal mine is to bring down the working face. How can one support what is to be brought down?

Two rival solutions have been put forward. Counsel for the defendants in the present appeal did not argue that a working face could never be a side. He submitted that it ceased to be a side when it is being knocked down. In the present case there was no evidence that anyone was knocking down or getting coal in the stint when the fall occurred or in its immediate neighbourhood. It was at one time suggested that it ceased to be a side as soon as it became undercut. This seems, to me at any rate, doing violence to the language, especially when it is recognised on all sides and by the statute that measures to make secure must follow immediately in the wake of the undercutter.

The other solution, which I accept, I would put in this way. The working face in the present case was and remained a side. As it was cut away it remained a side of the working place. Section 49 must, however, be applied subject to the fact that the object of mining is to get coal. To make secure is normally to support. The Act cannot be construed so as to compel the support of that which is to be brought down. On the evidence there would appear to me to be no difficulty in applying section 49 on this basis to the working face.

In the cutting shift the face was looked at to see that it was safe before the cutter started. If there were any overhanging bits they would be spragged up or knocked down. The holing props were put at regular intervals in the wake of the cutter. After the cutter had been along, the coal face would be further spragged if necessary and inspected by the deputy at the end of the shift. The next shift would fill off or bring down the coal. Further spragging is, one of the witnesses said, automatic when coal is being brought down. At the end of this shift the face would again be inspected to see if it was safe for the third shift which does the advancing of the roads and the conveyor. In the present case the filling shift were not able to fill off all the coal. It was inspected by the deputy who sounded it with his stick, saw that the holing props were in position, and that sprags were in position, if and where necessary. So far as he could recollect no sprags other than the holing props were necessary. He came to the conclusion it was safe. The fall occurred at a place where the deputy had not anticipated any danger.

I have given this short summary of the evidence because that evidence makes it clear to my mind that there is no difficulty in applying section 49 to a working face, having regard and subject to the main purpose of getting coal. It was suggested for the appellant that a convenient formula would be to imply the words "against unintended falls" after the words "made secure." I do not quarrel with this formula, but, as it is so difficult to forecast the circumstances of borderline cases, I would myself leave it in the general form in which I have stated it in the previous sentence.

On this view, there was a fall from a part of the side of a working place which should have been made secure. The defendants are therefore liable unless they can show that it was not reasonably practicable to avoid or prevent the fall (section 102 (8)). This defence was pleaded in the alternative. The main defence, which succeeded, was that the working face was not a side of the working place. The learned judge was not asked to make a finding as to whether the defendants could rely on section 102 (8), assuming section 49 was applicable to the place of the fall. Morris L.J., who came to the same conclusion as I have come to on the construction and application of section 49, would have ordered a rehearing on the defence based on section 102 (8). I think that this should be done for the reasons and on the terms set out by my noble and learned friend, Lord Morton of Henryton.

Lord Denning. My Lords, section 49 of the Coal Mines Act, 1911, was not new in 1911. It was first enacted in 1872 as one of the general rules which were to be observed "so far as is reasonably practicable" in every coal mine; and it was re-enacted in 1887 in the same words, see section 51, rule 16, of the Act of 1872 and section 49, rule 21, of the Act of 1887. When Parliament in 1911 omitted the words "so far as is reasonably practicable," it might be thought that a greater liability was placed on the mine owners. But a study of the relevant provisions has satisfied me that the responsibility of the mine owners has remained the same after 1911 as it was before. Their *criminal* responsibility has throughout been qualified by the exception that they can escape responsibility by proving—and the burden is on them to prove—that they have taken all reasonable means to prevent the contravention, see the last paragraph of section 51 of the Act of 1872, section 50 of the Act of 1887, and section 75 of the Act of 1911, as explained by Lord Kinnear in *Butler* v. *Fife Coal Co. Ltd.*[8] Their *civil* responsibility has throughout been qualified by the exception that they can escape responsibility by proving—and the burden is on them to prove—that it was not reasonably practicable to prevent the breach, see, on the wording before 1911, *Britannic Merthyr Coal Co. Ltd.* v. *David*[9] and *Marshall* v. *Gotham Co. Ltd.*[10]; and after 1911, section 102 (8) of the Act of 1911.

What, then, is the meaning of these words which have come down to us unaltered for 87 years: "The roof and sides of every "travelling road and working place shall be made secure"?

"Working place" means, I think, every place at which men are working or may be expected to work. It certainly included the area hard by the working face—150 yards long and 2½ yards wide—the stretch along which Mr. Gough was walking at the time of his accident. But what was the "roof" of that working place? and what were the "sides" of it? The "roof" was, I should have thought, the exposed surface over Gough's head as he walked along: and the "sides" were the exposed surfaces on either hand, the working face on his left hand, the packing on his right hand and the rib sides at the far ends before and behind him.

It is clear, I think that, for the purposes of this Act, a working face is a "side." Take the pillar and stall method of getting out coal. The coal is extracted by driving headings and cross-headings leaving blocks of coal to support the roof. These blocks of coal are extracted later. Meanwhile, the sides of these blocks are working faces. Parliament cannot have intended that they should be left insecure. Next take the longwall method, and consider the position during the day shift whilst the men are moving up the conveyer, and so forth. The working face is all the time a working place. It surely must be made secure for the men doing the work.

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[8] [1912] A.C. 149, 164–165; 28 T.L.R. 150.

[9] [1910] A.C. 74; 26 T.L.R. 164.

[10] [1954] A.C. 360.

This view is supported by the provisions for a pre-shift report. It is the duty of a deputy to make an inspection to see if the place is safe for the men coming on duty in the next shift. This duty is contained in section 61 (1) and (5) of the Act as amended by S.I. 1951, No. 848. The deputy is by that section put under a duty to make a pre-shift report specifying the condition of the "roof and sides." If any proper degree of safety is to be attained, "sides" here must include the working face. And the National Coal Board have recognised this in their printed form on which the deputy is to make his report. It contains this significant instruction:

"CONDITION OF ROOF AND SIDES

"State actual condition of (*a*) working faces and (*b*) roads.
"with location of any unsafe place and action taken."

But what does the section mean when it says that these sides are to be "made secure"? If a coal mine were to be regarded as a permanent structure underground, like the tunnels and stations of an underground railway, then an obligation to "make secure" the roofs and sides would mean make them *permanently* secure, so that they would last indefinitely as a protection against falls of material, always excepting, of course, earthquakes and atom bombs. But a coal mine is not a permanent structure underground. It is always on the move. The working face goes forward. The travelling roads get longer. The obligation to make the roof and sides secure cannot mean permanently secure, but only secure *for the time being*. Take the ripping roof. It is the roof of a working place. It must be made secure for the time being, although it is very soon to be ripped down to extend the travelling road. Consider the working face during the day shift when the men are moving up the conveyor. It is the side of a working place. It must be made secure for that shift at least, even though on the afternoon shift the cutter is going to cut along it.

But now comes the question: Does the obligation to make secure come to an end as soon as men begin to knock down the ripping roof or cut into the working face? Does the obligation cease from the time that the cutter starts at one end of the longwall of 150 yards, and not arise again until the day shift have filled off all the coal from the cut? I cannot think this is correct. I do not think the obligation to make secure ceases for any length of time at all. Whenever the roof is knocked down or sides are cut into, the portion which remains standing must immediately be made secure. It must be made secure from unintended falls. During the night shift, as soon as the cutter goes along, nogs must be inserted in the cut and the face props reset. During the day shift, as soon as coal is removed, temporary props must be erected to support the roof. And so forth. It may happen, of course, that on occasion more coal comes down than is intended. This is no breach by the mine owners so long as it was not reasonably practicable to avoid it. But save for such exceptions the obligation to render the face secure is a continuing obligation to make it secure, that is, free from danger of unintended falls.

So in this case, when a portion of the face remained standing after the cutter had cut underneath it, it was the obligation of the mine owners to make it secure. If nogs were not sufficient, sprags should have been put up to buttress the face. Only in that way could men like Gough be protected whilst at their working place.

There remains, however, the question: Was it reasonably practicable for the National Coal Board to avoid the breach? The burden in this respect was on the National Coal Board and they have no finding on it in their favour. I should not be prepared on the transcript to hold they had discharged it. And I do not myself feel disposed to send the case back for a retrial so as to give them the opportunity of getting a finding on it now. They should have asked the judge to find it at the trial. I would, therefore, allow the appeal and direct that judgment should be entered for £600, the damages assessed by the judge.

Appeal allowed.

Solicitors: *Stafford Clark & Co. for Hooper & Fairbairn, Dudley; Donald H. Haslam for F. W. Dawson, Dudley.*

F. C.

JAMES CLINTON CHISHOLM . . . APPELLANT;

AND

JAMES HALL . . . . RESPONDENT.

J. C.*

1959
July 8.

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF JAMAICA.

Jamaica — Limitation of action — Boundaries — Contiguous plots of land — Disputed strip — Registered title defeated by limitation — Acquiescence in position of boundary fence for statutory period— Limitation of Actions Law (*c.* 395 *of R.S. of Jamaica*, 1938), *ss.* 3, 46.

Land Registration—Boundaries—Certificate—New certificate issued to replace lost certificate — New certificate merely a substitute — No alteration of rights—Limitation period not commencing from date of new certificate—Conflicting statutory provisions—Construction and reconciliation—Registration of Titles Law (*c.* 353 *of R.S. of Jamaica*, 1938), *ss.* 67, 69.

By section 3 of the Limitation of Actions Law (c. 395 of the Revised Statutes of Jamaica, 1938), an action to recover land must be brought "within 12 years next after the time at which "the right . . . to bring such action . . . first accrued"; and section 46 provides that where a reputed boundary between adjoining lands has been acquiesced in for seven years "such reputed "boundary shall for ever be deemed and adjudged to be the true "boundary. . . ."

The appellant and the respondent were the registered proprietors of contiguous plots of land in Kingston, Jamaica, the appellant, who had bought his plot on April 12, 1928, from his immediate predecessor in title who was registered as proprietor on March 12, 1928, having been himself registered on April 16, 1928. The respondent was registered as proprietor of his plot on October 30, 1941, having bought it on October 24, 1941, from the Administrator General for Jamaica as legal personal representative of the former owner who had died in 1918. The Administrator General as legal personal representative had obtained the registration of himself as proprietor and had had issued to him a new certificate of title on May 7, 1919, the certificate issued to the original owner on January 21, 1901, being cancelled. The Administrator General subsequently lost the certificate issued to him, and on October 16, 1941, obtained the issue to himself of a new certificate.

On November 18, 1942, the respondent brought an action against the appellant claiming, inter alia, a declaration that a strip of land seven feet wide on the appellant's side of the existing boundary fence between the plots and coextensive with their length was comprised in his (the respondent's) certificate of title. That action was discontinued by order in 1944, and on January 31, 1951, the respondent commenced the present action against the appellant for similar relief:—

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* *Present*: LORD RADCLIFFE, LORD JENKINS, THE RT. HON. L. M. D. DE SILVA.

Held (1) (affirming the Court of Appeal of Jamaica) that the disputed strip formed part of the land comprised in the plot in respect of which the respondent's predecessor in title was registered as proprietor in 1901.

But (2) (reversing the Court of Appeal) that the respondent's registered title had by the time of action brought been ousted in favour of the appellant quoad the disputed strip by the operation of the Limitation of Actions Law. The appellant had been for over 12 years in continuous possession of the disputed strip—from the date of his purchase on April 12, 1928, to the date of action brought, January 31, 1951—and could show more than seven years' acquiescence in the position of the existing boundary fence. Moreover, the appellant had completed more than 12 years' possession from April 12, 1928, before the Administrator General obtained the new certificate on October 16, 1941, in place of the lost one.

The issue of the new certificate on October 16, 1941, under section 81 of the Registration of Titles Law (c. 353 of the Revised Laws of 1938) "in place of the former certificate" did not have the effect of defeating the title by limitation to the disputed strip which the appellant had acquired under section 3 of the Limitation of Actions Law. The new certificate was merely a substitute for the lost one and the procedure under section 81 did not bring about any alteration of rights—the appellant had not to show 12 years' possession under section 3 or seven years' acquiescence under section 46 from October 16, 1941, the date of issue of the new certificate.

The provision in section 67 of the Registration of Titles Law that "every certificate of title . . . shall, subject to the subsequent "operation of any statute of limitations, be conclusive evidence "that the person named in such certificate . . . is seised or possessed of such estate or interest," which, if it stood alone, might well lead to the conclusion that "subsequent" must mean "subsequent to the issue of the certificate in question," was in flat contradiction of the express provision in section 69 of that Law that "the land which shall be included in any certificate of title ". . . shall be deemed to be subject . . . to any rights acquired "over such land since the same was brought under the operation of "this Law under any statute of limitations . . . notwithstanding "the same . . . may not be specially notified as incumbrances in "such certificate . . ." The two sections must be read together and the inclusion of the words "subject to the subsequent operation of any statute of limitations" in section 67 should not by implication abrogate the express saving accorded by section 69 to all rights acquired over the land in question since first registration under any statute of limitations whether before or after the date of the certificate of title for the time being in force. Further, even if "subsequent" in section 67 should be construed as meaning subsequent to the issue of the certificate in question, sections 67

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and 69 could be reconciled by treating as applicable to section 67 the "deeming" provision enjoined by section 69.

Goodison v. *Williams* (1931) Clark's Rep. (Jamaica) 349 overruled.

Dartadeen v. *Watson* (1937) 3 J.L.R. 87 considered.

Judgment of the Court of Appeal of Jamaica affirmed in part and reversed in part.

APPEAL (No. 15 of 1956), by special leave, from a judgment of the Court of Appeal of the Supreme Court of Jamaica (July 30, 1954) reversing a judgment of Semper J. (acting) (July 25, 1953).

The following facts are taken from the judgment of the Judicial Committee, where the relevant statutory provisions appear: The parties to this litigation, namely, the plaintiff (now respondent) James Hall, and the defendant (now appellant) James Clinton Chisholm, owned contiguous plots of land fronting the west side of King Street, Kingston, Jamaica, which ran approximately north and south. The defendant's plot was known as No. 105, King Street, and the contiguous plot belonging to the plaintiff and known as No. 103, King Street, lay immediately to the south of the defendant's plot. The plaintiff also owned the plot known as No. 101, King Street, which lay immediately to the south of No. 103, these two plots having for many years been held together.

The dispute concerned the proper position of the boundary between No. 105 to the north and No. 103 to the south. At the time of action brought there was and had for many years past been in existence a physical boundary running from west to east and dividing the combined area of Nos. 105 and 103 into two parts. The defendant's contention had been and was that the physical boundary existing upon the land was rightly placed, and showed the true dividing line between Nos. 103 and 105. The plaintiff's contention had been and was that the physical boundary was placed a matter of seven feet too far south and that there had to that extent been an unwarranted encroachment on No. 103. The area in dispute was thus a strip of land immediately north of the physical boundary, and some seven feet in width from north to south, and coextensive with the length of the two properties from east to west.

The plaintiff and the defendant were the registered proprietors of their respective properties under the Registration of Titles Law (chap. 353 of the Revised Laws of Jamaica). The first certificate of title in respect of Nos. 103 and 101 was granted to Morris Aria Bonitto as the proprietor thereof in fee simple on January 21,

1901. The first certificate of title in respect of No. 105 was granted to Eugenia Blanche Bonitto (the second wife and then the widow of Morris Bonitto) as the proprietor thereof in fee simple on March 12, 1928. The defendant bought No. 105 from Eugenia Bonitto under a transfer dated April 12, 1928, and was duly registered as proprietor thereof on April 16, 1928. The plaintiff bought Nos. 103 and 101 under a transfer dated October 24, 1941, from the Administrator General for Jamaica as the legal personal representative of Morris Bonitto, who had died on November 20, 1918; and the plaintiff was duly registered as the proprietor of these two plots on October 30, 1941.

It was important to note: (i) that the Administrator General as legal personal representative of Morris Bonitto had applied for and obtained the registration of himself as proprietor of Nos. 101 and 103 by transmission under section 124 of the Registration of Titles Law, and had on that occasion procured the issue to himself of a new certificate of title in his own name dated May 7, 1919, the certificate originally issued in the name of Morris Bonitto on January 21, 1901, being cancelled accordingly; and (ii) that the Administrator General had subsequently lost the certificate issued to him on May 7, 1919, and had under section 81 of the Law applied for and obtained the issue to himself of a new certificate dated October 16, 1941, in place of the lost certificate, which was accordingly cancelled.

On November 18, 1942, the plaintiff commenced an action against the defendant in the Supreme Court of Jamaica for a declaration that the disputed strip of land was comprised in his certificate of title, possession and mesne profits. That action was, however, wholly discontinued by order dated June 21, 1944.

On January 31, 1951, the plaintiff commenced a further action against the defendant in the Supreme Court (being the action out of which the present appeal arose) for similar relief, the defendant counterclaiming for a declaration that the north and south boundaries of Nos. 101–3 and 105 as then existing were the true boundaries between the said properties and for rectification of the register. That action was tried before Semper J. who by his judgment dated July 25, 1953, dismissed the plaintiff's claim and made a declaration in the terms claimed by the defendant. The plaintiff appealed to the Court of Appeal of the Supreme Court (Carberry C.J., MacGregor and Rennie JJ.), who by their judgment dated July 30, 1954, allowed the plaintiff's appeal, set aside the judgment of Semper J. and entered judgment for the plaintiff for the relief sought. The defendant now appealed from that judgment.

The questions in the appeal were in substance these: (i) whether the disputed strip formed part of the land comprised in Nos. 103 and 101, in respect of which the plaintiff's predecessor in title Morris Bonitto was registered as proprietor on January 21, 1901, or formed part of the land comprised in No. 105, in respect of which the defendant's predecessor in title Eugenia Bonitto was registered as proprietor on March 12, 1928; and (ii) in the event of that question being answered in favour of the plaintiff, whether his registered title had by the time of action brought been ousted in favour of the defendant quoad the disputed strip by the operation of the Limitation of Actions Law (chap. 395 of the Revised Laws of Jamaica).

The trial judge decided the first of these two questions in the defendant's favour and accordingly found it unnecessary to decide the second.

The Court of Appeal decided both questions in favour of the plaintiff, holding that, so far as they were concerned, the second question was concluded against the defendant by the majority decision of the same court in *Goodison* v. *Williams*.[1]

1959. April 27, 28; May 1, 6. *John L. Arnold Q.C.* and *John Monckton* for the appellant. The two substantial questions are: (1) Whether on the true construction of the documents of title, determined after consideration of such extrinsic evidence as may properly be taken into account, the respondent can show that the disputed strip is included in the land described in his certificate of title; and (2) whether the remedy sought by the respondent is barred by the operation of the Limitation of Actions Law of Jamaica. Both courts below found that the boundary fence has been in the position in which it now is since 1902. It is also beyond question that the appellant has been in exclusive possession of the strip since 1928, and during 1937 he carried out substantial building work on it. In the forefront of the appellant's case is put the submission that it would be a very remarkable result if the loss of the certificate of title by the Administrator General and the issue of the new one to him on October 16, 1941, could have the striking effect of preventing the operation of the Limitation of Actions Law. The decision in *Goodison* v. *Williams* [1]—by which the Court of Appeal below were bound—

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[1] (1931) Clark's Reps. of Sup.Ct.Judgmts. 349.

was that if at any time during the history of the registered title a new certificate of title is issued to a proprietor—a subsequent certificate—then an uncut period of limitation which has up to that time run in favour of the person in possession cannot be counted towards the limitation period. It is said for the respondent that, applying that decision here, when the Administrator General lost the certificate issued to him in 1919 and obtained the new one in 1941, the fact that from 1928 to 1941 the appellant had been in adverse possession avails him nothing.

For the respondent to succeed he must do so by the strength of his own title. In considering the construction of the registered title the courts have taken extrinsic evidence into account. *Dunn* v. *Lareau* [2] indicates the sort of things one looks at; it shows that (a) where there is a long history of uninterrupted possession the onus of establishing that title to the land is in someone else is a heavy one, and (b) where there is a doubt in the description, the best starting point is to see who was in possession of the land at the relevant time. The evidence here shows that from 1928 to the present day the appellant has been in undisputed possession of the strip. And the evidence of Mrs. Bonitto shows that there was no change in the position from 1902 to 1928. The inference is that the position was the same in 1901 as it was in 1902 and onwards for 40 years; the proper inference is that the fence was always there.

Next, the point of law, which arises only if the appellant fails on the general question of identity, and the Board come to the conclusion that some person through whom the respondent claims was at some time in possession of this strip, is whether, as the respondent contends, a statutory title can be acquired only by adverse possession for the requisite period running wholly after the grant of the duplicate registration certificate on October 16, 1941. The appellant submits that the requisite period can include a period before the date of the issue of the duplicate registration certificate in a case in which the period has run since the date of the first registration and the squatter is in possession at the date of the new registration. The two most relevant sections of the Registration of Titles Law for present purposes are sections 67 and 69. The submission is that on the true construction of this Law, and particularly of sections 67 and 69, there is nothing in the Law which in any way alters the acquisition of rights under the Limitation of Actions Law in relation to registered land at any time after the registration.

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[2] (1888) 57 L.J.P.C. 108.

The other relevant statute is the Limitation of Actions Law, and reliance is placed on section 46—the only one argued in this case in any court. Section 3 would be applicable if section 46 is not appropriate on the ground that this is not to be regarded as a boundary suit at all; it is submitted that it is. All the facts relevant to a consideration of the case under either section 46 or section 3 are before the Board. If section 46 be the relevant one, there was, on the evidence, a boundary submitted to and acquiesced in along the line of the present boundary for a continuous period from 1928 until 1942, when the respondent ceased to acquiesce. That gives a continuous period of 14 years which ends after the registration of the transfer of title. If, on the other hand, it is wrong to say that this is a boundary dispute, and it is not the sort of case with which section 46 is intended to deal, one comes back to section 3, and the result is that no person can now bring an action to recover the strip because more than 12 years have elapsed since that right first accrued to some person through whom the respondent claims. The appellant is entitled to resist an action for ejectment, and that is all that he seeks to do.

The Limitation of Actions Law says quite plainly that when certain things happen certain results are to follow. If that is not to be the consequence as regards land which is registered, then it is necessary to find that the Registration of Titles Law says in plain terms that it is not. In Hogg on Registration of Title to Land throughout the Empire (1920), which deals with registration of land in Jamaica, it is said at p. 87, with regard to the position after initial registration: "In Jamaica the registered title is "subject 'to any rights acquired' over the land since initial "registration 'under any statute of limitations.'" The authority for that is given as what are now sections 67 and 69. And at p. 94 the conclusiveness of a registered title and its limits and exceptions are dealt with; see also p. 99. If, indeed, the ordinary operation of limitation statutes over registered land is to be excluded by the language of the registration statute, then that language must be very clearly expressed: *Belize Estate and Produce Co. Ltd.* v. *Quilter*[3]; that case is of assistance as a matter of approach, though it is distinguishable, for in the instant case the period had run partly since and partly before the respondent's title was registered. In *Goodison* v. *Williams* [4] two of the three judges held that the period before does not count, the other that it does: if the respondent is right that the present is a section 3 case, the facts of that case and this one seem to be directly comparable. In *Dartadeen* v. *Watson* [5] the two judges took opposing views on the point. Those are the only two cases in Jamaica in which this question has been canvassed.

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[3] [1897] A.C. 367, 371; 13 T.L.R. 347.

This is a case where, under section 67 of the Registration of Titles Law, the evidential value of the certificate is qualified by what is the subsequent operation of any statute of limitations. A question arises on the word "subsequent"; subsequent to what? The first submission is that in order to bring all this into line the best thing to do is to read "subsequent" in section 67 in the same sense as the phrase in section 69, "the land which "shall be included in any certificate of title . . . shall be deemed "to be subject . . . to any rights acquired over such land since "the same was brought under the operation of this Law under "any statute of limitations . . ." Both section 69, in that passage, and section 67 in the context of the qualification on the evidential value of the certificate, are dealing expressly with the extent to which the statute of limitations may continue to operate, and it would be an odd thing if the extent of the operation in section 67 was different from that under section 69, and since section 69 states in precise terms the extent of the period within which the operation of the statute of limitations remains, and section 67 does not deal with the matter precisely—it uses merely the word "subsequent," which depends for its operation on the answer to the question, subsequent to what?—the basic submission is that section 67 is meant to have the same sort of effect as section 69. In section 69 it includes the whole period since the sale. There is nothing in section 67 which says or suggests that it is placing a bar on the acquisition of rights; it merely qualifies the evidential value of the certificate. There is nothing in section 69 which bars a man in possession from any time after the first registration of title from saying, "I have been in possession now "for the full period, I am still in possession," and though he may have part of his statutory period before another registration, he is entitled to say that he has acquired a right, and the proviso to section 69 preserves that right.

Either section 46 or section 3 must be the relevant section;

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[4] Clark's Reps. of Sup.Ct.Judgmts. 349.

[5] (1937) 3 J.L.R. 87.

it is not a correct view to conjure up some metaphysical conception as to what is and what is not a boundary dispute.

Monckton following. First, the documentary evidence does not justify the claim which the respondent makes as regards the boundary. Secondly, on the true construction of section 67 of the Registration of Titles Law and in light of the fact of the issue of the certificate of title on October 16, 1941, that event did not result in the destruction of the appellant's title—that is on the assumption that it is a statutory title. If the proposition of the respondent—that on the issue of a new certificate the statutory rights of the squatter are destroyed—is right, the context of section 67 is quite inconsistent with the policy of section 46 of the Limitation of Actions Law, and quite inconsistent with the policy of section 69 of the Registration of Titles Law, and with the policy of giving notice to third parties of the proceedings.

D. N. Pritt Q.C. and *David S. Hunter* for the respondent. The first important question—one of fact—is whether the disputed strip was covered by the title given to the respondent by the registration of 103, King Street. The Court of Appeal, having decided that matter in the present respondent's favour, had to face the issue of limitation, and they held that they were bound by *Goodison* v. *Williams* [6] and that the statute of limitations, on the facts of this case, could not be invoked in favour of the appellant here. The second question for the Board is a little wider than whether *Goodison* v. *Williams* [6] is right; it is, is the doctrine on which that case rests of such width that the respondent can say, on the facts of this case, that the appellant cannot rely on the statute of limitations? The third, and very important, question—not dealt with by either court below because it did not arise there—is, can the appellant on the facts of the case and on the pleadings and other documents succeed in making good his title to this strip either by relying on section 46 or section 3 of the Limitation of Actions Law?

As to the first question, the disputed strip is comprised in the certificates of title granted to the respondent's predecessors in title and the transfer to him was duly registered thereon. Those certificates of title, coupled with the documentary and other evidence relating to measurements, establish the respondent's title to the strip.

With regard to the second point; registration laws are designed to give security of title and to render dealings with land less expensive. As against the true owner a squatter is entitled to no consideration until the moment that, x years having elapsed, he gets one of three things: (i) Inevitably, that the true owner cannot successfully bring an action against him. (ii) Generally, that the same statute provides that the owner's title shall be extinguished. (iii) Often, that the statute provides that he shall then have a perfectly good title. The point was made for the appellant that it would be odd and unreasonable as against an inchoate squatter that, whenever there is a new certificate for private reasons, the inchoate squatter should suffer. One answer is that an inchoate squatter does not suffer, because he does not exist; nobody has the slightest obligation to consider him in the least. The real answer is that it is not unreasonable to say that whenever a new certificate is definitely issued the statute will start to run again if the law says so. It is not unreasonable that a squatter should have no rights against the purchaser who has the certificate which tells him that he need not worry about the statute of limitations. If sections 67 and 69 of the Registration of Titles Law do say that, and they do, then the submission for the appellant is answered. Section 67 must, of course, be given a sensible meaning and operation consistently with section 69. The two sections, it is submitted, have not to be read together. Section 67 provides three things: (i) No certificate granted and registered is to suffer any defect on account of certain informalities. (ii) Every certificate shall be evidence of certain particulars and of the entry thereof—that means entry of the particulars. (iii) It shall be "conclusive evidence that the person named in "such certificate as the proprietor of . . . the land therein "described is seised or possessed of such estate . . ." Section 67 is strongly in the respondent's favour; looked at alone, it is very clear, and on this second point *Goodison's* case [7] was right. The appellant cannot rely on the operation of any statute of limitation unless it is subsequent, which must mean subsequent to the issue of the certificate.

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[6] Clark's Reps. 349.

The proviso to section 69 of the Registration of Titles Law is not the place in which any rights are created; it is the place in which they are preserved. The proviso to section 69 shows that the Limitation of Actions Law is not to be regarded as inconsistent with this Law.

The new certificate is not quite a duplicate of a duplicate, as was said for the appellant. One gets a new certificate, which gets a fresh number and a fresh book-binding operation.

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[7] Clark's Reps. 349.

As to the authorities, *Goodison* v. *Williams*[7] and *Dartadeen* v. *Watson*[8] are right and should be upheld. [Reference was also made to *March* v. *Thomas*,[9] *Russell* v. *Pusey*[10] and *Gibbs* v. *Messer*.[11]]

On the third point: if the respondent wins on the first point—that the strip is comprised in his certificate of title—but loses on the second, and the appellant can rely on the Limitation of Actions Law, then the position under that statute is that if he has to start on October 16, 1941, or from the registration of the transfer on October 30, 1941, 12 years brings him to 1953. He is then faced with the fact that the writ of summons was issued on January 31, 1951. That is the position under section 3. With regard to section 46, seven years from 1928 would be 1935, and the only occasion on which it can be said that the respondent made any overt act of objection in any shape or form is the issue of the summons in 1942, and he has got his seven years straight off in 1935. If he has to try to make out seven years from the last certificate in 1941 he would be defeated as soon as he started by the same issue of the proceedings in 1942. Those proceedings were discontinued on June 21, 1944, and seven years from June 21, 1944, would not run out by January 31, 1951.

Hunter following. The Board were asked by the appellant to say that *Goodison* v. *Williams*[12] and *Dartadeen* v. *Watson*[13] were wrong. Rightly or wrongly, those cases established what is a very convenient conveyancing rule, and a rule which is not peculiar to Jamaica—it has been established in other countries with similar Acts. It is significant that the Jamaican Act in this case is word for word the same as the Victorian (Australian) statute, and so the Board were referred to *Gibbs* v. *Messer*[14] and the views of the Board on the purpose of the Act. The Jamaican judges were right in applying that case to the Jamaican Act. Recent certificates of title might be disturbed if the Board were to say that the *Goodison*[15] and *Dartadeen*[16] cases were wrong. The leading authority on stare decisis is *Bourne* v. *Keane*,[17] and when considering this matter the three questions of Lord Buckmaster in *Bourne's* case should be put: will any title be shaken? can any person complain? and will the general course of dealing be altered? In this case all three ought to be answered in the negative.

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[8] 3 J.L.R. 87.

[9] Unrep.: Sup.Ct. of Jamaica, March 12, 1917.

[10] Unrep.: Sup.Ct. of Jamaica, Dec. 23, 1924.

[11] [1891] A.C. 248.

[12] Clark's Reps. 349.

[13] 3 J.L.R. 87.

[14] [1891] A.C. 248.

[15] Clark's Reps. 349.

[16] 3 J.L.R. 87.

[17] [1919] A.C. 815, 874; 35 T.L.R. 560.

So far as the certificate of title is concerned, the matter should be approached by considering section 67 and ascertaining what is its meaning taken alone; and, secondly, by considering that section in its context in the Act to see if the context is sufficient to lead to the conclusion that the prima facie meaning of the section is to be qualified. It is submitted that the prima facie meaning is clear; " particulars " means what it says. There is nothing in the context of the Act which cuts down that prima facie meaning.

The reference to the statute of limitations in the proviso to section 69 is entirely inappropriate to cover rights acquired by adverse possession. That proviso is so ill-conceived that it should not detract from the clear meaning of section 67. There is one clear and one ambiguous section. The draftsman has put it in the wrong place in section 69.

A bona fide transferee for value is put in a better position than his transferor; he is protected by several sections of the Act.

Arnold Q.C. in reply. This is an action for ejectment and the plaintiff (respondent) must prove his case. A proviso is a place in which rights are created if it so enacts, and, with regard to sections 67 and 69, what can be more natural than to borrow certainty, if there is certainty in section 69, to feed uncertainty where it exists in section 67—if in the end the Board say that there is repugnancy between those sections, then there is that way out.

The Act is designed precisely to avoid the transferee getting a better position than the transferor. What is to pass to the transferee is the estate and condition of the proprietor. If the Board come to a conclusion favourable to the appellant on the construction of sections 67 and 69, there is nothing in section 84 to cause the Board to resile from that.

As to stare decisis, first, there are not here the sort of decisions which have ever been made the subject of the doctrine; and, secondly, it is not right to say that this is the sort of subject-matter to which the doctrine applies. As regards the quality of the decision, see *per* Lord Parmoor in *Bourne* v. *Keane* [18] and *per* Viscount Simon L.C. in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*[19]

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[18] [1919] A.C. 815, 915.

[19] [1943] A.C. 32, 45.

July 8. The judgment of their Lordships was delivered by LORD JENKINS, who stated the facts set out above and continued: Notwithstanding the full and careful argument presented on the defendant's behalf, their Lordships find themselves in agreement with the conclusion in favour of the plaintiff reached by the Court of Appeal on the first question, and substantially accept the reasons for that conclusion given in the judgment of the court delivered by MacGregor J., which will gain nothing by repetition. Moreover, the first question is deprived of practical significance by the view their Lordships have formed on the second.

In these circumstances their Lordships feel that no useful purpose would be served by debating the first question any further, and they refrain from doing so.

As to the question of limitation, the relevant statute of limitations is, as already observed, the Limitation of Actions Law (chap. 395 of the Revised Laws of Jamaica). Section 3 of that Law imposes a limitation period of 12 years on actions for the recovery of land, and is in these terms: "No person shall make "an entry or distress, or bring an action or suit to recover any "land or rent, but within twelve years next after the time at "which the right to make such entry or distress, or to bring "such action or suit, shall have first accrued to some person "through whom he claims, or, if such right shall have not "accrued to any person through whom he claims, then within "twelve years next after the time at which the right to make "such entry or distress, or to bring such action or suit, shall "have first accrued to the person making or bringing the same."

Section 31 is in these terms: "At the determination of the "period limited by this Part of this Law to any person for "making an entry or distress, or bringing any action or suit, "the right and title of such person to the land or rent, for the "recovery whereof such entry, distress, action or suit respectively "might have been made or brought within such period, shall be "extinguished."

Section 46 contains special provisions as to boundaries, and so far as material for the present purpose is in these terms: "In "all cases where the lands of several proprietors bind or have "bound upon each other, and a reputed boundary hath been or "shall be acquiesced in and submitted to by the several proprietors owning such lands, or the persons under whom such "proprietors claim, for the space of seven years together, such "reputed boundary shall for ever be deemed and adjudged to be "the true boundary between such proprietors; and such reputed "boundary shall and may be given in evidence upon the general "issue, in all trials to be had or held concerning lands, or the "boundaries of the same, any law, custom or usage to the "contrary in anywise notwithstanding."

Section 46 of chapter 395 was, but section 3 was not, pleaded in the defence, and an objection was taken on the plaintiff's behalf to reliance being placed by the defendant on section 3, but this objection was not persisted in, and their Lordships accordingly propose to deal with the question of limitation on the footing that section 3 is available to the defendant as well as section 46.

It is common ground that if this was a case of common law, as distinct from registered titles, the defendant would be entitled to succeed under either section.

As regards section 3, the defendant can show over 12 years' continuous possession of the disputed strip from the date of his purchase of No. 105 on April 12, 1928, down to the date of commencement of the present proceedings on January 31, 1951.

As regards section 46, the defendant can show more than seven years of acquiescence in the position of the physical boundary from the date of his purchase on April 12, 1928, down to the commencement of the plaintiff's first, and abortive, action on November 18, 1942. Moreover, the defendant had completed more than 12 years' possession from April 12, 1928, before the Administrator General procured the issue to himself on October 16, 1941, of a new certificate of title to Nos. 101–103 in place of the lost certificate which had been issued to him on May 7, 1919; and there had also been more than seven years' acquiescence in the position of the physical boundary from April 12, 1928, by the date of the issue of such new certificate.

The plaintiff's contention is that under the provisions of the Registration of Titles Law (chap. 353) the issue of the new certificate in place of the lost one on October 16, 1941, had the effect of destroying the rights which had already accrued to the defendant under the Limitation of Actions Law (chap. 395), so that the defendant, in order to make good his defence of limitation, must show 12 years' possession under section 3 or seven years' acquiescence under section 46 computed from October 16, 1941. This the defendant could not do, since the present proceedings were commenced on January 31, 1951, which was less than 12 years from October 16, 1941; and the period of acquiescence computed from the latter date would have been interrupted before it reached seven years by the commencement of the plaintiff's abortive action on November 18, 1942, and if computed from the date of discontinuance of that action on June 21, 1944, would not have reached seven years by January 31, 1951, when the present proceedings were started.

The plaintiff's contention on this part of the case demands reference at some length to the provisions of the Registration of Titles Law. This Law is one of many enactments for the registration of titles in force in this country and in various parts of the Commonwealth and Empire. But these enactments are by no means uniform in their terms, and it was agreed in the course of the argument that no useful purpose would be served by comparing other enactments with the Jamaican Law, or citing cases decided on other enactments as aids to the construction of the Jamaican Law. Their Lordships therefore approach this question as one which turns simply and solely upon the true construction of the Jamaican Law itself.

Section 2 of the Law is in these terms: " All laws and practice " whatsoever, relating to freehold and other interests in land, " so far as is inconsistent with the provisions of this Law, are " hereby repealed, as far as regards their application to land " under the provisions of this Law, or the bringing of land under " the operation of this Law."

Section 3 contains a number of definitions and includes the following: " ' incumbrance ' shall include all estates, interests, " rights, claims and demands, which can or may be had, made " or set up, in, to, upon or in respect of the land adversely and " preferentially to the title of the proprietor; ' instrument ' shall " include a conveyance, assignment, transfer, lease, mortgage, " charge and also the creation of an easement."

Sections 23 to 25 provide as follows: " 23. Land may be " brought under the operation of this Law by the registrar regis" tering the title of some person thereto as the proprietor thereof " in manner hereinafter provided. 24. The title of any person to " land brought under the operation of this Law shall be registered " either as an absolute or as a qualified title. 25. A person " registered under this Law as proprietor of any land with an " absolute title shall be entitled to hold such land in fee simple, " together with all rights, privileges and appurtenances, belonging " or appurtenant thereto, subject as follows—(*a*) to the incum" brances (if any) entered on the certificate of title, and (*b*) to " such liabilities, rights and interests, as may under the provisions " of this Law subsist over land brought under the operation of " this Law without being entered on the certificate of title as "incumbrances, but free from all other estates and interests "whatsoever including estates and interests of His Majesty, his "heirs and successors, save only quit rents, property tax or other "impost, charged generally on lands in this Island, that have "accrued due since the land was brought under the operation of "this Law."

Section 32 provides (to put it shortly) that when the registration of any title has been provisionally approved by one of the referees under the Act, notification thereof is to be given by advertisement or advertisements as therein mentioned and also personally to all persons in possession or charge of the adjoining lands so as to give them an opportunity of lodging a caveat against the registration of the title in question. Section 36 provides that if no caveat is lodged within the time limited by the notice the title is to be registered. Under section 54 land is to be brought under the operation of the Law by the registration by the registrar of a certificate in the prescribed form. The certificate is to be made out in duplicate, one copy being bound up in the register book and the other issued to the proprietor.

Sections 67 and 69 (the critical sections for the purposes of the present case) are in these terms: "67. No certificate of title "registered and granted under this Law shall be impeached or "defeasible by reason or on account of any informality or irregu- "larity in the application for the same, or in the proceedings "previous to the registration of the certificate; and every certifi- "cate of title issued under any of the provisions herein contained "shall be received in all courts as evidence of the particulars "therein set forth, and of the entry thereof in the register book, "and shall, subject to the subsequent operation of any statute "of limitations, be conclusive evidence that the person named "in such certificate as the proprietor of or having any estate or "interest in, or power to appoint or dispose of the land therein "described is seised or possessed of such estate or interest or "has such power."

"69. Notwithstanding the existence in any other person of "any estate or interest, whether derived by grant from the Crown "or otherwise, which but for this Law might be held to be para- "mount or to have priority, the proprietor of land or of any "estate or interest in land under the operation of this Law shall, "except in case of fraud, hold the same as the same may be "described or identified in the certificate of title, subject to any "qualification that may be specified in the certificate, and to "such incumbrances as may be notified on the folium of the

‘‘ register book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the ‘‘ estate or interest of a proprietor claiming the same land under ‘‘ a prior registered certificate of title, and except as regards any ‘‘ portion of land that may by wrong description of parcels or ‘‘ boundaries be included in the certificate of title or instrument ‘‘ evidencing the title of such proprietor not being a purchaser ‘‘ for valuable consideration or deriving from or through such ‘‘ a purchaser: Provided always that the land which shall be ‘‘ included in any certificate of title or registered instrument shall ‘‘ be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, ‘‘ and to any rights acquired over such land since the same was ‘‘ brought under the operation of this Law under any statute of ‘‘ limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon ‘‘ or affecting such land, and to any unpaid rates and assessments, ‘‘ quit-rents or taxes, that have accrued due since the land was ‘‘ brought under the operation of this Law, and also to the ‘‘ interests of any tenant of the land for a term not exceeding ‘‘ three years, notwithstanding the same respectively may not ‘‘ be specially notified as incumbrances in such certificate or ‘‘ instrument.’’

Section 81 (under which the Administrator General obtained his second new certificate in the present case) provides by subsections (1) and (2) as follows: ‘‘ 81.—(1) Whenever a duplicate ‘‘ certificate of title or special certificate of title is lost or destroyed ‘‘ the registered proprietor of the land or some person claiming ‘‘ through him may apply to the registrar to cancel the certificate ‘‘ of title and to register a new certificate in duplicate in the ‘‘ name of the registered proprietor or his transferee in place of ‘‘ such certificate and duplicate or special certificate. On proof ‘‘ being furnished to his satisfaction of such loss or destruction, ‘‘ and on such requisitions, if any, which he may make being ‘‘ complied with, and on the expiration of the notice to be given ‘‘ as hereinafter provided without sufficient cause having been ‘‘ shown against the application, the registrar shall cancel the ‘‘ certificate and register a new certificate in duplicate in the ‘‘ name of the registered proprietor or his transferee in place of ‘‘ the former certificate and duplicate or special certificate, both ‘‘ of which shall thereupon be deemed to be cancelled. (2) Before ‘‘ disposing of the application the registrar shall give at least "fourteen days' notice thereof in at least one newspaper and "such other notice, if any, as he may think fit."

Section 84 enables a proprietor to transfer his interest, and provides that: "... Upon the registration of the transfer, the "estate and interest of the proprietor as set forth in such instrument, or which he shall be entitled or able to transfer or dispose "of under any power, with all rights, powers and privileges "thereto belonging or appertaining, shall pass to the transferee; "and such transferee shall thereupon become the proprietor "thereof, and whilst continuing such shall be subject to and "liable for all and every the same requirements and liabilities "to which he would have been subject and liable if he had "been the former proprietor, or the original lessee, mortgagee or "annuitant."

Section 87, after providing for cases in which part only of the land comprised in a registered title is transferred, continues as follows: "... but when the whole of the land passes to any "person other than as aforesaid, it shall not be incumbent on "the registrar to make out a new certificate of title in the name "of such person, but such person shall be deemed to be duly "registered as proprietor of such land when a memorandum of "the transfer or other legal mode as aforesaid shall have been "registered under this Law: Provided always that if the transferee desire it, the registrar shall cancel the certificate of title "and the duplicate, and shall retain such duplicate, and issue "a new certificate of title in the name of the transferee. . . ."

Section 124 provides for the registration of persons acquiring registered land by transmission, this being the provision under which the Administrator General was registered in respect of Nos. 101 and 103 in the present case.

Many other sections of the Law were referred to in the course of the argument, but the question at issue in the end turns upon the true construction of sections 67 and 69, which contain the only references to limitation to be found in the Law. Section 67 provides that "every certificate of title . . . shall be received in "all courts as evidence of the particulars therein set forth, and "of the entry thereof in the register book, and shall, subject to "the subsequent operation of any statute of limitations, be "conclusive evidence that the person named in such certificate "as the proprietor of or having any estate or interest in . . . the "land therein described is seised or possessed of such estate or "interest. . . ."

That provision, if it stood alone, might well lead to the conclusion that "subsequent" must mean "subsequent to the "issue of the certificate in question" and that on the principle of expressio unius exclusio alterius any interest in the land in question acquired by the prior operation of any statute of limitations is defeated by the issue of a certificate of title under any of the provisions of the Law, the distinction being between rights so acquired before the issue of the certificate which are extinguished and rights so acquired after the issue of the certificate, which are preserved. But section 69 contains a positive provision to the effect that "the land which shall be included in any certificate "of title or registered instrument" (which by definition includes a transfer) "shall be deemed to be subject . . . to any rights "acquired over such land since the same was brought under the "operation of this Law under any statute of limitations . . . "notwithstanding the same . . . may not be specially notified "as incumbrances in such certificate or instrument."

The construction which it might be proper to place on section 67 construed in isolation is in flat contradiction of the express provisions of section 69. The two sections must clearly be read together and so far as possible reconciled with each other. If the words "subject to the subsequent operation of any statute of "limitations" had been omitted from section 67 it would have been reasonably plain that section 67 must be understood as taking effect subject to the provisions of section 69 regarding rights acquired over the land in question since first registration under any statute of limitations, and it can hardly be right to hold that the inclusion in section 67 of the words "subject to "the subsequent operation of any statute of limitations" should by implication abrogate the express saving accorded by section 69 to all rights of this description acquired since first registration, whether before or after the date of the certificate of title for the time being in force.

Even if the word "subsequent" in section 67 should be construed as meaning "subsequent to the issue of the certificate "in question" the two sections, in their Lordships' opinion, can and should be reconciled by treating as applicable to section 67 the "deeming" provision enjoined by section 69. There is, so far as their Lordships can see, no reason why that provision, which is expressed in perfectly general terms, should not be so applicable. The result of applying it quoad limitation to section 67 is that the part of that section under which the certificate is to be conclusive evidence that the person therein named as proprietor of or having any estate or interest in the land therein described is seised or possessed of such estate or interest must be read as if it was followed by a proviso in terms conforming to the language of section 69, i.e., a proviso to the effect that the land described in the certificate is to be deemed to be subject to any rights acquired over it since first registration under any statute of limitations, notwithstanding that they are not notified as incumbrances in the certificate. If it is objected that this construction of section 67 makes the words " subject to the subsequent opera- " tion of any statute of limitations " mere surplusage, the answer is that even if that is so the anomalous and, indeed, absurd results ensuing from excluding all certificates quoad the effect of limitation from the " deeming " provision in section 69, so far as rights acquired prior to their issue are concerned, are in their Lordships' view so extreme as to justify the construction so far placed on the two sections notwithstanding that the words above quoted may be said to be rendered otiose by that construction. But it does not appear to their Lordships that the construction so far placed on the two sections does necessarily render wholly otiose the words " subject to the subsequent operation of any " statute of limitations " in section 67. Let a case be supposed in which some part of the land described in a given certificate had prior to its date been acquired from the registered proprietor by virtue of 12 years' possession since the date of the first registration of the land so described. Then under sections 67 and 69, as their Lordships have so far construed them, the certificate would be conclusive evidence that the person named in the certificate as proprietor of or having any estate or interest in the land therein described was seised or possessed of such estate or interest subject to the rights acquired over a part of such land by virtue of 12 years' possession between the date of the first registration and the date of the certificate, those rights falling to be regarded by virtue of section 69 as if they had been notified as incumbrances in the certificate. But in the absence of any provision to the contrary it might be argued that section 67 made the certificate conclusive evidence that the land was held as described in the certificate subject only to rights acquired by limitation between the date of the first registration of the land and the date of the certificate and therefore ranking as registered incumbrances at that date, and not to any rights so acquired after the date of the certificate. The words " subject to the " subsequent operation of any statute of limitations " might thus be regarded as having been put into section 67 ex abundante cautela to meet any argument of this kind.

But the same conclusion can, in their Lordships' view, be reached by another route. The critical words in section 67—"subject to the subsequent operation of any statute of limitations"—contain the first of the only two references to limitation to be found in the Law. The reader is thus invited to look further to see what provision is made later in the Law in regard to the operation of any statute of limitations, the brief reference to limitation in section 67 being in itself of doubtful import. Looking further, the reader comes to section 69 and he there finds a provision to the effect that the land included in any certificate is to be deemed to be subject to any rights acquired over such land since the same was brought under the operation of the Law under any statute of limitations, notwithstanding that such rights may not be specially notified as incumbrances in such certificate. Having reached this point, is he not justified in concluding that the reference to limitation in section 67 is a mere reference forward to the provision in regard to limitation contained in section 69, and that "subsequent" in section 67 is no more than a short way of saying what is said by section 69 in the words "since the same," i.e., the land, "was brought "under the operation of this Law"? In their Lordships' view this construction, which can be compendiously described as making the word "subsequent" in section 67 mean subsequent to the date of issue of the first certificate issued in respect of the land in question, can legitimately be adopted for the purpose of reconciling the provisions of the two sections.

Accordingly, their Lordships hold that on one or other of the methods of construction which they have propounded the defendant's contention as to the effect of sections 67 and 69 should prevail.

The scheme of section 69 is reasonably plain. The registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance, no doubt, on the provisions as to the investigation of the title to the property and as to notices and advertisements, which are considered a sufficient protection to anyone claiming any rights of that description. But from and after the first registration the first proprietor and his successors are exposed to the risk of losing the land or any part of it under any relevant statute of limitations to some other person whose rights when acquired rank as if they were registered incumbrances noted in the certificate, and accordingly are not only binding upon the proprietor against whom they are originally acquired but are not displaced by any subsequent transfer or transmission. See as to transfers section 84, which provides that the transferee shall be "subject to and liable for all and "every the same requirements and liabilities to which he would "have been subject and liable if he had been the former "proprietor." This language indicates an intention to put the transferee in the same position for all purposes as the previous proprietor; and although the words used are not particularly apt to describe rights acquired by limitation, a transfer is in any case one of the instruments to which the "deeming" provision of section 69 is applicable.

The combined effect their Lordships would attribute to sections 67 and 69 may perhaps be criticised as inconvenient, in that it places upon a purchaser of registered land the onus of going behind the register, and satisfying himself that no adverse interest by limitation has been acquired, in every case in which more than 12 years have elapsed since the title was first registered. But that is simply the result of the policy adopted by the Law of preserving rights acquired by limitation notwithstanding that they are not noted in the register.

At all events, their Lordships' construction of sections 67 and 69 has the merit of consistency, and avoids the anomalous and absurd results which would ensue from the adoption of the construction which the plaintiff seeks to place upon the two sections. On that construction a man could acquire a title to registered land by 12 years' possession and, having done so, enforce it against the registered proprietor, although no note of it was on the register, provided that no new certificate had been issued since his title by limitation was acquired. But the issue of a new certificate in whatever circumstances and for whatever reason, would destroy a complete title by limitation after it had been acquired. Thus, if a transferee or person entitled by transmission was to demand and obtain a fresh certificate under section 87, any right over the land previously acquired by limitation would be extinguished, but if for any reason he did not do so the right would remain. More than one other example might be given, but their Lordships are content to confine themselves to the actual case now before them. What happened here was that the Administrator General, having lost the new certificate issued to him on May 7, 1919, as having become entitled by transmission to Nos. 101 and 103, applied for and obtained a further new certificate in place of the lost one under section 81 of the Law, such further new certificate being dated October 16, 1941. It is claimed on the plaintiff's behalf that the purely fortuitous circumstance of the loss of the certificate of May 7. 1919, and the consequent issue of the certificate of October 16, 1941, to take its place, had the effect of defeating the title by limitation to the disputed strip which the defendant had acquired under section 3 of the Limitation of Actions Law on the expiration on April 12, 1940, of the period of 12 years from April 12, 1928, when No. 105 together with the disputed strip came into his possession. Their Lordships find it quite impossible to attribute this effect to the issue of a new certificate in place of a lost one. Section 81 provides in such a case for the issue of a new certificate " in place of the former certificate." This language appears to their Lordships to indicate that the new certificate is merely a substitute for the lost one and that the procedure under section 81 whereby it is obtained merely has the effect of placing the proprietor in the same position as if the former certificate had not been lost, and does not bring about any alteration of rights. It may be observed that section 81 extends to the destruction as well as the loss of a certificate and that so far as destruction is concerned it is not confined to accidental destruction. Thus, according to the plaintiff's argument, it would seem that if the proprietor was minded to defeat a right to his land acquired by limitation he could do so by the simple expedient of destroying his certificate and obtaining a new one under section 81. This surely cannot be right.

As to *Goodison* v. *Williams*,[1] the decision of the Court of Appeal by which they held themselves bound to decide the question of limitation in the present case in favour of the plaintiff, that was a case in which, after a title by 12 years' possession had been acquired by another person, the registered proprietor transferred the land and a new certificate was issued to the transferee pursuant to what is now section 87 of the Law. It was held by the majority of the court (Clark and Radcliffe JJ.) that the issue of the new certificate to the transferee had the effect of defeating the title acquired by limitation. The third member of the court, Brown A.C.J., dissenting, held on substantially the same grounds as those already stated by their Lordships that the certificate did not have this effect but that the title by limitation was preserved by what is now section 69, which must be read as qualifying what is now section 67. Clark J. appears to have based his decision mainly upon the view that the exclusive possession " rights over land " contained in section

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[1] (1931) Clark's Reps. of Sup.Ct.Judgmts. 349.

69 applied only to rights in the nature of easements and so forth, and not to the right of exclusive possession over the land itself. It appears to their Lordships that this view is untenable having regard to the express reference to "any statute of "limitations."

Radcliffe J. appears to have held that even if the "deeming" provision in section 69 did apply to rights of exclusive possession acquired by limitation, that carried the matter no further, having regard to the terms of section 67; and that section 69 did not affect a bona fide transferee for value who found no notice on the register of an adverse claim. This reasoning appears to their Lordships to ignore the express provision in section 69 to the effect that the rights acquired by limitation to which it applies are to be preserved notwithstanding that they may not be specially notified as incumbrances in the certificate or other instrument.

Their Lordships are of opinion that the view taken by the Acting Chief Justice in *Goodison* v. *Williams*[2] in his dissenting judgment was right, and that the majority decision in that case was wrong and should be regarded as overruled.

Other Jamaican cases were referred to in the course of the argument. Their Lordships find it unnecessary to mention any of these with the exception of *Dartadeen* v. *Watson*,[3] in which a Court of Appeal of two judges was equally divided in a case involving a title acquired by limitation to registered land and the effect thereon of what are now sections 67 and 69 of the Law, Furness C.J. distinguishing *Goodison* v. *Williams*[4] and upholding the claim to a title by limitation, and Sherlock J. taking the opposite view.

It was suggested in argument that on the principle of stare decisis their Lordships should not disturb the decision in *Goodison* v. *Williams*. But the only decision bearing upon the point is *Goodison* v. *Williams* itself, which was a majority decision reached by the two judges who formed the majority on different grounds, and strongly dissented from by the other member of the court. In *Dartadeen* v. *Watson*[5] the court was equally divided as to the application of *Goodison* v. *Williams* to the facts of that case, which accordingly adds nothing by way of authority one way or the other. Moreover, it must be remembered that the present appeal differs from *Goodison* v. *Williams* in that it is concerned with the special case of a certificate issued in the place of a lost certificate.

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[2] Clark's Reps. 349.

[3] (1937) 3 J.L.R. 87.

[4] Clark's Reps. 349.

[5] 3 J.L.R. 87.

Accordingly, there is not in their Lordships' judgment any such uniform current of authority as would be required to justify them in departing from their own view of the construction and effect of the Registration of Titles Law with respect to limitation in deference to the principle of stare decisis, which in their judgment has no application here.

For the reasons which they have stated, their Lordships are of opinion that the defendant, while failing on the question concerning the inclusion of the disputed strip in the plaintiff's registered title, succeeds on the question of limitation. Their Lordships will therefore humbly advise Her Majesty that this appeal should be allowed and the order of the Court of Appeal dated July 30, 1954, set aside and the formal judgment of the Supreme Court dated July 25, 1953, restored.

The plaintiff must pay the costs of the present appeal and the costs awarded against him by the judgment of the Supreme Court as now restored; but in the somewhat unusual circumstances of the case their Lordships consider that each party should pay his own costs of the appeal to the Court of Appeal.

Solicitors: *G. F. Hudson, Matthews & Co.; A. L. Bryden & Williams.*

C. C.

[HOUSE OF LORDS.]

QUALCAST (WOLVERHAMPTON) LTD. . APPELLANT;

AND

HAYNES . . . . RESPONDENT.

H. L. (E.)*

1959
Feb. 23, 24, 25;
Mar. 25.

Negligence—Safe system of work—General precautions—Metal welding—Protective clothing available for workmen—No orders or advice to wear it—Workman injured—Employers' liability.

Judicial Precedent—Question of fact—Jury question—Decision of judge on it not a precedent.

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* *Present*: LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW and LORD DENNING.

H. L. (E.)

1959

QUALCAST (WOLVERHAMPTON) LTD.
v.
HAYNES.

Fact or Law—Negligence—Standard of care—Always a question of fact.
Law Report—Reporting of decisions—No principle of law—Standard of care issue in action for negligence.

While handling a ladle of molten metal in a foundry an experienced moulder was injured when the ladle slipped splashing the metal on to his foot. He was not wearing protective spats which would have prevented the injury, although his employers, to his knowledge, kept a stock of them available for the asking; he had not been ordered or advised to wear them. He sued his employers for negligence. The county court judge considered that the plaintiff was so experienced that he needed no warning, and that there was therefore no negligence on the part of the defendants, but held that he was bound by authority to decide otherwise:—

Held, that the county court judge erred in law in holding that he was so bound by authority, for the issue whether the defendants ought to have urged the plaintiff to wear the spats was one of fact, and (Lord Cohen dissenting) there was no reason to differ from the judge's view that there was no negligence on the part of the employers in regard to this particular workman.

Per Lord Somervell. Since most negligence cases have been tried without juries, the distinction between the functions of judge and jury has been blurred, but if the reasons given by a judge for arriving at the conclusion formerly reached by a jury are to be treated as "law" and citable, the precedent system will die from a surfeit of authorities.

Decision of the Court of Appeal [1958] 1 W.L.R. 225; [1958] 1 All E.R. 441 reversed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Parker and Sellers L.JJ.).

This was an appeal from an order of the Court of Appeal dated January 24, 1958, ordering that the appeal of the appellants, Qualcast (Wolverhampton) Ltd., from a judgment of Judge R. H. Norris, dated August 16, 1957, and given at the Wolverhampton County Court should be dismissed and that the appellants should pay the costs of that appeal. The appellants were defendants in the action in the county court and the respondent, John Henry Haynes, was plaintiff.

The facts, stated by Lord Keith of Avonholm, were as follows: The respondent was a moulder, some 38 years of age, and had been a moulder all his working life. He had been employed as such by the appellants for some 12 or 13 weeks, at their foundry at Wolverhampton, when the accident which gave rise to this action happened, on September 16, 1954. As found by the judge, the respondent was casting at the moulding boxes, when the ladle of molten metal which he was holding slipped and some of the metal splashed on to his left foot causing him some injury from which, after a few months' disability, he entirely recovered. This was not the case that was made by the respondent, but it was the way in which the judge held that the accident happened and he dealt with the case on that footing. The respondent's case was that he was carrying a ladle of molten metal along a gangway in the foundry when he stumbled over an obstacle whereby the metal splashed over his foot. The judge disbelieved that account of the accident, and much of the respondent's case, founded on alleged breach of section 26 of the Factories Act and certain regulations of the Iron and Steel Foundries Regulations, 1953, accordingly disappeared. The case came to centre on two alleged grounds of negligence, that the appellants (1) " failed to provide " any or any proper spats or other sufficient protective clothing "; and (2) " failed to provide a safe system of work and proper plant " and equipment." These resolved themselves in the end into the question of the duty of the appellants to provide the respondent with protective clothing.

The course which the case took in the county court accounted for an absence of evidence with regard to the practice of wearing spats or other protective clothing in foundries generally and for a concentration on the respondent's own practice in the matter of wearing spats. The appellants, as well as denying the allegation that they were negligent, took the defence that, in any event, the accident resulted from the respondent's own negligence. In the result the judge apportioned three-quarters of the negligence causing the accident to the respondent and one-quarter to the appellants. The Court of Appeal affirmed that judgment. No cross-appeal had been taken to the House of Lords by the respondent.

The material facts on which the case turned were contained in a short passage in the judgment of the judge: " Now when " the accident happened the plaintiff was wearing ordinary boots " with a leather tongue inside, part of which was sewn up to " some distance, but they were ordinary boots. I find that " there were spats in the stores which could be had for the " asking, and that there were also strong boots in the stores " which could be had on payment. The plaintiff was not " ordered or advised by the defendants to wear protective clothing, and I think that was because he was an experienced " moulder. The foreman, who gave evidence, Kenneth Charles " Bloor, stated that had the plaintiff been a learner he would " have advised him about wearing protective clothing, but as he " was an experienced man he considered that he did not need any " warning; he knew and appreciated the risks of the metal "splashing attaching to his work. I believe that if he had "wanted spats he could have had them for the asking. I think "he knew of all the risks involved and quite voluntarily decided "to wear the boots which he was wearing, and I believe that "since the accident and since his return to work as a moulder he "has not worn any protective clothing. Since the accident he "has done as he did before." Later he said: "In the present "case, the spats and boots were there and the plaintiff knew they "were there, but he was never told that they must be worn. He "decided the matter himself."

R. Marven Everett Q.C. and *H. J. Garrard* for the appellant company. In the case of an industrial process which involves an obvious and well-known risk of injury, there is no legal duty on an employer of skilled and experienced workmen to do more than provide suitable protective equipment for use by those men in that process, where those men know (1) the nature and extent of the danger; (2) that the protective equipment is available for their use; (3) its whereabouts; and (4) where they choose of their own volition to work in such clothing as they themselves prefer.

It is important that the legal duties should be in accordance with the practical affairs of the industry: see *Paris* v. *Stepney Borough Council*,[1] which provides the clearest indication that such a case of injuries must be resolved by the tribunal of fact as a pure question of fact. Once the judge appreciates what the legal situation is, he will not, in reaching his conclusion as a jury, go through a dozen law reports to find out what he should decide on that aspect of the case.

Here the judge should have asked himself whether a reasonable and prudent foundry owner should have been required to go to an experienced moulder to tell him that spats were used in the industry and to offer to provide them. Should he have gone further and advised him to wear them or made it a local rule? The answer is No. It is wrong to treat the effect of factual decisions as laying down a general rule that in any future case the employer must provide for instruction and exhortation of his men. That is not so. It is a question of fact in every case. The employer's liability involves a general duty of reasonable care, but there is no general duty irrespective of particular conclusions. Two conflicting ideas have influenced the decisions, (a) "nurse-maiding" the workman who is to be regarded as in a special category, and (b) having regard to the degree of education in the task which would warrant ascribing to him a greater degree of responsibility. The right principles were laid down in *Winter* v. *Cardiff Rural District Council*,[2] *per* Lord Porter, Lord Oaksey, Lord MacDermott and Lord Reid. See also *Woods* v. *Durable Suites Ltd.*,[3] *Smith* v. *Austin Lifts Ltd.*[4] and *Wilson* v. *Tyneside Window Cleaning Co.*,[5] which was approved in *Smith's* case.[6]

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[1] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

The court should be slow to decide that reasonable and prudent men in the position of these employers should do more than the appellants have done in this case. Applying the principles laid down by Lord Macmillan in *Glasgow Corporation* v. *Muir*,[7] if this case had been approached as a matter of duty the argument for the respondent could not have been put so high. *Clifford* v. *Charles H. Challen & Son Ltd.*,[8] *Crookall* v. *Vickers-Armstrong Ltd.*,[9] *Finch* v. *Telegraph Construction and Maintenance Co. Ltd.*[10] and *Nolan* v. *Dental Manufacturing Co. Ltd.*[11] do not lay down a principle of law.

An employer's duty, if any, to give advice to his men would depend on some special feature, for example, an insidious deadly type of danger, inexperienced and young workers or exceptionally severe damage likely to result from an apparently trivial risk.

The Iron and Steel Foundries Regulations, 1953 (S.I. 1953, No. 1464), require by regulation 8 the provision and maintenance by the occupiers of an iron or steel foundry of protective equipment, including gloves, respirators and goggles, but do not require the provision of protective spats or boots. Regulation 8 (3) imposes on employed persons the duty of using that equipment. See also regulations 4, 5, 6 and 7. When a specific code deals with protective devices in relation to a specific process the court should be slow to say that the common law requires anything further. Even if the appellants had not provided spats at all they would not have been liable.

The judge was right up to a certain point and then he deviated the other way. The authorities to which he referred did not compel him to hold that the appellants were in breach of their duty to the respondent since negligence is a question of fact and not of law. The particular cases on which he relied were *Bibury* v. *Harrison, McGregor & Guest Ltd.*,[12] *Brooker* v. *Jenkins Brothers Proprietors Ocean S.S. Co. Ltd.*[13] and *Webb* v. *Smith, Bingley & Evans Ltd.*[14] These were decisions on fact.

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[2] [1950] 1 All E.R. 819, 822, 822–823, 825; 114 J.P. 234.

[3] [1953] 1 W.L.R. 857, 860, 862; [1953] 2 All E.R. 391.

[4] [1959] 1 W.L.R. 100, 105, 106, 114, 117; [1959] 1 All E.R. 81.

[5] [1958] 2 Q.B. 110, 121; [1958] 2 W.L.R. 900; [1958] 2 All E.R. 265.

[6] [1959] 1 W.L.R. 100.

[7] [1943] A.C. 448, 457; 59 T.L.R. 266; [1943] 2 All E.R. 44.

[8] [1951] 1 K.B. 495; [1951] 1 T.L.R. 234; [1951] 1 All E.R. 72.

[9] [1955] 1 W.L.R. 659; [1955] 2 All E.R. 12.

[10] (1949) 65 T.L.R. 153; [1949] 1 All E.R. 452.

[11] [1958] 1 W.L.R. 936; [1958] 2 All E.R. 449.

The judge should have paid more attention to the effect of the regulations. A guide to the way they should be approached is found in *England* v. *National Coal Board.*[15] See also *Roberts* v. *Dorman Long & Co. Ltd.*[16] The regulations would almost constitute a trap for employers if there rested on them in relation to an experienced workman the obligation here suggested.

The judge was wrong in treating conclusions of fact in the same way as matters of law. He said that if he were not bound by authority he would hold that there was no negligence, and the rest of his judgment must be read in the light of those words. He thought that the authorities compelled him to the conclusion that there was in all cases a duty on employers to advise, instruct, admonish and exhort their workmen to use safety devices. But a judge deciding a jury question tries to decide as " the man on the " Clapham omnibus " would decide and that is not a decision of law.

Further, on the point of causation, the respondent would not have worn the protective spats in any event, even if he had been advised. What Lord Goddard C.J. said on the causation point in *Roberts* v. *Dorman Long & Co. Ltd.*[17] was said in relation to that particular case. As a general proposition, it is an overstatement to say that a person who is under a duty to provide safety appliances and fails to do so cannot be heard to say that, even if he had done so, they would not have been worn. He referred to *A. L. Underwood Ltd.* v. *Bank of Liverpool.*[18] But if *Roberts* v. *Dorman Long & Co. Ltd.*[19] purports to lay down the general principle suggested it cannot stand with *Bonnington Castings Ltd.* v. *Wardlaw*[20] which shows that the onus of proving causation rested on the respondent. It must always be open to the court to decide as a matter of causation whether the fault of the employer caused the accident, or whether the injury was entirely due to the employee's own fault. See also *Nolan's* case,[21] *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.*[22] and *Bolton* v. *Stone.*[23] Here it was open to the judge to hold that the probability was that the respondent would not have worn spats even if he had been advised to do so, and that his injuries were due entirely to his own fault.

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[12] (1955) Unrep., January 18 (Gerrard J. at Manchester Assizes).

[13] (1956) Unrep., February 20 (Gorman J. at Liverpool Assizes).

[14] (1956) Unrep., December 18 (Stable J. at Birmingham Assizes).

[15] [1953] 1 Q.B. 724, 731–732; [1953] 2 W.L.R. 1059; [1953] 1 All E.R. 1194; (H.L.) [1954] A.C. 403; [1954] 2 W.L.R. 400; [1954] 1 All E.R. 546.

[16] [1953] 1 W.L.R. 942; [1953] 2 All E.R. 428.

[17] [1953] 1 W.L.R. 942, 946.

[18] [1924] 1 K.B. 775; 40 T.L.R. 302.

[19] [1953] 1 W.L.R. 942.

[20] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.

No further duty rested on the appellants in the circumstances. The regulations provide an exhaustive code as to protective devices and the employer cannot be required to do more than they lay down. As a question of causation, even if there was a duty on the appellants to give advice to their men on this subject, and they did not do so, that was not the cause of the accident.

John Thompson Q.C. and *Irvon Sunderland* for the respondent. The judge and the Court of Appeal correctly applied to the facts the law relating to the duty of care which an employer has towards his workmen engaged in a process involving risk of serious injury.

In an appeal court it is all important to see the context in which the case was being considered in the lower court. Here the judge reserved his judgment to consider whether the conclusion which he was disposed to embrace (namely, that the duty of an employer to a skilled man went no further than to have on the premises the means of protection) could be held in view of the authorities cited. He found that they compelled the rejection of that conclusion. This appeal is brought in the hope of getting a decision that there is no further duty on the employers. In the county court both sides were saying that a cause of the accident was that the respondent was not wearing spats and each side was saying that this denoted negligence on the part of the other.

As to the relevance of the regulations, see *Finch's* case.[24] It is suggested by the appellants that the Iron and Steel Foundries Regulations preclude the judge's finding. That is a point which has not hitherto been raised. The regulations do not comprehend the whole duty of an employer. They prescribe duties which are of such importance that they are properly fortified by punishment under the criminal law for breach, but they are not exhaustive. The appellants had spats available on the premises and both sides emphasised their utility and their value. The real question was whose fault was it that they were not used.

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[21] [1958] 1 W.L.R. 936.

[22] [1956] A.C. 552, 559; [1956] 1 W.L.R. 177; [1956] 1 All E.R. 385.

[23] [1951] A.C. 850, 858–859; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

[24] 65 T.L.R. 153.

In the Court of Appeal Lord Evershed M.R. said [25] that the question was whether the provision of spats, in the sense of having them available for the asking, was a sufficient performance of the appellants' obligations. That properly states the question. Before the question of negligence can be answered there must be reference to some legal conception of duty resting on an employer. That was the value of seeing how other judges had dealt with the question in similar cases in this field. *Clifford* v. *Charles H. Challen & Son Ltd.*[26] shows the nature and extent of the employer's duty in cases such as this. If the appellants in the present case are right the Court of Appeal was wrong in that case in interfering on a pure question of fact. See, in particular, the judgment of Asquith L.J.[27] The judges there were speaking of what the law required. See also *General Cleaning Contractors Ltd.* v. *Christmas*,[28] *per* Lord Reid. It is unthinkable that a judge trying an action where a question of the provision of safety equipment in window cleaning was in issue should refuse to take the same view as Lord Reid on the ground that he was there dealing with an issue of fact.

The active aspect of the employer's duty—to promote safety—is the thread running through the authorities. Thus an employer should buy spats for his men. But spats in the store do not help anyone. It cannot be right that just to have them there without doing anything more is sufficient discharge of the duty referred to by Lord Reid in *General Cleaning Contractors Ltd.* v. *Christmas.*[28] That is not the meaning of "provide," a conception which includes giving admonition and advice to the workmen.

The appellants relied on *Wilson* v. *Tyneside Window Cleaning Co.*,[29] but there Pearce L.J.[30] emphasises the employer's duty to take reasonable care not to subject his employees to unnecessary risk. If an employer does not do more than these employers did here it is true to say that in his system of work he is indifferent whether protective equipment is or is not used. An employer, because he is an employer, can decide how things shall be done. If he is indifferent whether protective spats stay in the store or are worn by the person to be protected he can be criticised for the way in which he carries out his operations. The question is whether the employers in this context are entitled to be thus indifferent to whether or not the protective clothing is worn and whether it may fairly be inferred that they have sanctioned the non-wearing of the spats. The master is not an insurer but he must take steps to see that spats are worn.

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[25] [1958] 1 W.L.R. 225, 229; [1958] 1 All E.R. 441.

[26] [1951] 1 K.B. 495.

[27] Ibid. 499–500.

[28] [1953] A.C. 180, 193–194; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110.

[29] [1958] 2 Q.B. 110.

[30] Ibid. 121.

The question of negligence or no negligence is not entirely one for the individual judge without regard to any standards deduced from the authorities. It is not submitted that the cases cited by the county court judge laid down a standard which must be universally adopted, but in considering whether the primary facts denote negligence by the employer one should have regard to judicial decisions in other cases indicating the principles to be borne in mind as showing the nature and content of his duty. In *Woods* v. *Durable Suites Ltd.*[31] Morris L.J. enumerated the criteria for estimating the effect of the primary facts in determining the question of negligence. If, once the primary facts were found, the conclusion whether there was negligence or no negligence were completely uncontrolled, the effect would be chaotic. Here the judge, in looking at the cases he did, was only looking at the reflection of several other cases going back to *Smith* v. *Charles Baker & Sons*,[32] in which the judges laid down a consistent principle. *Finch's* case [33] indicated the minimum requirements of the obligation to " provide " such equipment, and also the nature of the duty. It was an appropriate case for the judge to consider, as were also *Cooper* v. *K. L. Steelfounders & Engineers Ltd.*,[34] *Bibury's* case,[35] *Brooker's* case [36] and *Webb's* case.[37] In *Drummond* v. *British Building Cleaners Ltd.*[38] the Court of Appeal reversed Pilcher J. on the question whether or not negligence should be found. In the course of doing so they referred to *General Cleaning Contractors Ltd.* v. *Christmas*,[39] and treated what was there said as binding on them to the extent that they must say the same kind of thing.

As to the causation point, there is no inconsistency between *Roberts'* case [40] and *Drummond's* case [41] on the one hand, and the *Bonnington* case [42] on the other.

The elements of the final problem for the judge were these:

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[31] [1953] 1 W.L.R. 857, 864.

[32] [1891] A.C. 325; 7 T.L.R. 679.

[33] 65 T.L.R. 153.

[34] (1951) Unrep., April 12 (Lynskey J.).

[35] Unrep.

[36] Unrep.

[37] Unrep.

[38] [1954] 1 W.L.R. 1434, 1439; [1954] 3 All E.R. 507.

[39] [1953] A.C. 180.

[40] [1953] 1 W.L.R. 942.

[41] [1954] 1 W.L.R. 1434.

[42] [1956] A.C. 613.

Spats were not being worn and he thought they should have been. They were available. He had to consider whose fault it was that they were not worn. Did the appellants do their part? Did the respondent do his? The appellants left it to chance whether the respondent would find out about the spats and wear them.

The authorities exhibit, in its application to different circumstances, the judicial concept of the duty which the law requires to be performed by employers. The application of that duty in different circumstances does not always require identical action, but the law has defined the concept. The judge was right in instructing himself by reference to the cases what that concept was and in applying it to the facts which he found. The actual results of the cases referred to did not bind him; what did bind him was the law which the judges had applied to the facts before them in reaching the results which they did reach.

There are intermediate stages between merely having the protective spats on the premises, on the one hand, and making it a rule to wear them on pain of dismissal, on the other.

R. Marven Everett Q.C. in reply. A moulder is not all the time engaged in pouring molten metal, which is a very quick process; most of the time he is making moulds with damp sand.

The question is a mixed question of fact and law. One must first decide what is the general standard of duty and then relate it to the particular facts of the particular case. Here the right view is that unless the appellants carried the requirement of wearing spats to the final sanction of dismissal for failure to do so, the final arbiter must be the workman himself. The evidence shows that the respondent was quite well aware of the provision of the spats.

For the respondent it was submitted that the requirement to "provide" includes giving the men admonition and advice to wear the spats. But the language should not be so stretched: see *Norris* v. *Syndic Manufacturing Co.*[43] and *Farquhar* v. *Chance Brothers Ltd.*[44] If the workmen know that the things are there and can be got, they are "provided."

Clifford's case [45] was considered in *Woods* v. *Durable Suites Ltd.*,[46] and the Court of Appeal held that it was decided on its own particular facts.

A householder does not tell his gardener: "You may prick "your fingers on the thorns. Wear the leather gloves provided."

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[43] [1952] 2 Q.B. 135, 145; [1952] 1 T.L.R. 858; [1952] 1 All E.R. 935.

[44] [1951] 2 T.L.R. 666, 667, 668.

[45] [1951] 1 K.B. 495.

[46] [1953] 1 W.L.R. 857, 860, 861, 863.

A farmer does not tell his labourers to wear a hat in the harvest field for fear of sunstroke. It is different with a child, but one does not need to advise those who are educated in their particular task.

Their Lordships took time for consideration.

March 25. LORD RADCLIFFE. My Lords, I have had the opportunity of reading in advance the opinion that is about to be delivered by my noble and learned friend, Lord Keith of Avonholm. I agree with his conclusions and with the reasons which he gives for arriving at them.

I do not think that I need say more, therefore, than that I think that the appeal must be allowed. I am satisfied that the careful judgment of the learned county court judge is vitiated by the fact that he treated the law as compelling him to attribute a breach of duty to the appellants solely because they had not urged or instructed the respondent to wear protective spats while engaged in the work of moulding. Had he not believed himself to be under this legal compulsion he would, as he says, have found that there was no negligence on the part of the appellants. In my opinion the law cannot be expressed in any such absolute or simplified form as he supposed.

There are only two words of caution which I would add to what will be said by others of your Lordships. One is that, though indeed there may be cases in which an employer does not discharge his duty of care towards his workmen merely by providing an article of safety equipment, the courts should be circumspect in filling out that duty with the much vaguer obligation of encouraging, exhorting or instructing workmen or a particular workman to make regular use of what is provided. Properly to measure that obligation as a legal duty requires a fuller knowledge of the circumstances of the factory and of the relations between employers and workmen and their representatives than was available at any rate in the present case. Particularly would that be so, I think, when, as here, there had only just come into force an enactment, the Iron and Steel Foundries Regulations, 1953, which, though containing a regulation expressly devoted to the subject of "protective equipment," included no reference at all to the provision or use of protective spats.

The second point is that, however much attention is concentrated in these cases upon the adequacy of the system of working at the place of work, actions of negligence are concerned with the duty of care as between a particular employer and a particular workman. An experienced workman dealing with a familiar and obvious risk may not reasonably need the same attention or the same precautions as an inexperienced man who is likely to be more receptive of advice or admonition. Here, no doubt, the question of delimiting the duty merges with the question of causation.

I would allow the appeal.

LORD COHEN. My Lords, I have had the opportunity of reading in print the speeches which will shortly be delivered by my noble and learned friends, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning. I respectfully agree with the observations they make as to the proper use of authorities in cases such as the present, and I cannot usefully add anything to what they say on that subject. I have, however, the misfortune to differ from them as to the proper application of those principles to the present case. Since this is really a question of fact, and I find myself in complete agreement with what was said thereon in the Court of Appeal by the Master of the Rolls and Parker L.J. (as he then was), I do not think I can usefully add anything to the reasons they give for their conclusion. I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, this case comes to your Lordships' House on appeal from a judgment of the Court of Appeal (Lord Evershed M.R., Parker L.J., as he then was, and Sellers L.J.), affirming a judgment of the county court judge, His Honour Judge Norris.

[His Lordship stated the facts and continued:] On this view of the facts the learned judge expressed himself as follows: "Now, if I were not bound by authority I should decide that "the plaintiff was so experienced that he needed no warning "and that what he did was with the full knowledge of the "risks involved, and that there was no negligence on the part "of the defendants." It seems clear what he was here saying. The plaintiff "needed no warning," that is against the danger of splashing from molten metal and on the advisability of wearing protective clothing. "What he [the plaintiff] did" was, in the knowledge of the risk, to wear no protective clothing other than his own boots. The learned judge then proceeds: "But I "feel in view of the authorities cited to me that such a decision "would be wrong and I feel compelled to come to a different "conclusion."

My Lords, in my opinion, the learned judge has here misdirected himself. The cases referred to, which I do not find it necessary to examine in detail, differed in material respects from the facts of the present case. In the sphere of negligence where circumstances are so infinite in their variety it is rarely, if ever, that one case can be a binding authority for another. A case may enounce a principle which may be capable of application in other cases, but I know of no principle that in all cases and all circumstances an employer is liable for failing to see that a foundryman is supplied or supplies himself with spats or boots, or at the lowest is "exhorted or pressed with ardour" to avail himself of such protection. It is in this last phrase alone that I can discover in the judge's judgment any principle by which he professes to have guided himself. But these words were used in a very different kind of case, a case of pneumoconiosis where the risk, the nature of the risk, the workman's appreciation of the risk and the consequences of falling a victim to the risk were in an entirely different plane. It is clear to my mind that if the learned judge had not thought, wrongly, in my opinion, that he was bound by the authorities which he cites, he would have found that there was no negligence on the part of the appellants. If he had done so his judgment would, in my opinion, have been unassailable.

The duty owed by the employers was a duty owed to the plaintiff. This is not necessarily the same as the duty owed to others of the workers. The duty may vary with the worker's knowledge and experience. The learned Master of the Rolls and Parker L.J. correctly state the duty generally as the duty of an employer to take reasonable care for the safety of his workmen. But in the present case the Master of the Rolls regards the appellants as owing to all their workmen an identical standard of care, and goes on to say[1] that "since, on the judge's finding, the "defendants did nothing at all other than have the gaiters "ready for those that asked, I think they did fall short of their "duty." With all respect to the learned Master of the Rolls, this is hardly in accordance with the evidence or with the judge's findings. It is clear on the evidence that the employers did advise inexperienced men to wear spats, and possibly others as well. The Master of the Rolls treats the judge's conclusion as being a conclusion of fact which he is unwilling to disturb. But, in my opinion, as expressed, the judge's conclusion is not a conclusion of fact but a conclusion of law reached on an erroneous assumption that he was bound by a series of inapplicable authorities. Sellers L.J. takes the view, with which I agree, that the plaintiff's attitude, as revealed in his evidence, was that he did not think it necessary to wear spats for his protection and that is why he did not wear them. But he reluctantly feels himself bound to support the learned judge and dismiss the appeal.

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[1] [1958] 1 W.L.R. 225, 230; [1958] 1 All E.R. 441.

As I have already said, the course that the case took in the county court may have prevented sufficient attention being paid to practice in the matter of the wearing of spats or other protective wear in foundries. There is a suggestion in the evidence that the majority of the men in the appellants' foundry disliked wearing spats, and, for all I know, there may be reasons for not wearing spats. It is not insignificant that regulation 8 of the Iron and Steel Foundries Regulations, 1953, while requiring the provision of suitable gloves or other protection for the hands, approved respirators for men working in heavy dust concentrations, and suitable goggles or other eye protection for men working in certain conditions, requires no provision of boots, spats or other protective foot or leg equipment. This is in no sense conclusive of the scope of an employer's duty, but it has some evidential value in a case otherwise lacking in evidence of practice in this direction. We listened to some argument on the meaning of the word "provide." Apart from use in statute or statutory regulation, where the word may call for a definite meaning, the word as expressive of a duty can have but an ambulatory connotation. In considering whether there is a common law duty on an employer to provide something, the scope of the obligation must vary with the particular circumstances of the case. This case is but one illustration of the limit of the nature of the provision in relation to the plaintiff on the assumption that there was a duty to provide spats for him. Spats were provided for him in the sense that they were available for him if he wished to use them and he knew they were available. He decided for himself that he did not wish to use them. In the circumstances of this case I cannot hold that the employers had a further duty to bring pressure to bear on him to use them, a pressure which, on the evidence, he would have ignored and might have resented. The spats being available, there was, in my opinion, no failure of duty on the part of the employers to provide spats for this workman.

A separate argument was advanced for the appellants on the point of causation. The two questions to some extent run into one

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another. If, as I think, there was no negligence here on the part of the appellants in relation to the plaintiff, there could be no negligence causing the accident. I find it unnecessary to consider causation on the opposite assumption.

I would allow the appeal.

LORD SOMERVELL OF HARROW. My Lords, I also would allow the appeal. In the present case the county court judge, after having found the facts, had to decide whether there was, in relation to this plaintiff, a failure by the defendants to take reasonable care for his safety. It is, I think, clear from the passage cited by my noble and learned friend that he would have found for the defendants but for some principle laid down, as he thought, by the authorities, to which he referred.

I hope it may be worth while to make one or two general observations on the effect on the precedent system of the virtual abolition of juries in negligence actions. Whether a duty of reasonable care is owed by A to B is a question of law. In a special relationship such as that of employer to employee the law may go further and define the heads and scope of the duty. There are cases in your Lordships' House which have covered this ground, I would have thought by now, exhaustively (*Wilson's and Clyde Coal Co. Ltd.* v. *English* [2]; *Latimer* v. *A.E.C. Ltd.*[3]; *General Cleaning Contractors Ltd.* v. *Christmas* [4]; and there are, of course, others). There would seem to be little, if anything, that can be added to the law. Its application in borderline cases may, of course, still come before appellate tribunals. When negligence cases were tried with juries the judge would direct them as to the law as above. The question whether on the facts in that particular case there was or was not a failure to take reasonable care was a question for the jury. There was not, and could not be, complete uniformity of standard. One jury would attribute to the reasonable man a greater degree of prescience than would another. The jury's decision did not become part of our law citable as a precedent. In those days it would only be in very exceptional circumstances that a judge's direction would be reported or be citable. So far as the law is concerned they would all be the same. Now that negligence cases are mostly tried without juries, the distinction between the functions of judge and jury is blurred. A judge naturally gives reasons for the conclusion formerly arrived at by a jury without reasons. It may sometimes be difficult to draw the line, but if the reasons given by a judge for arriving at the conclusion previously reached by a jury are to be treated as "law" and citable, the precedent system will die from a surfeit of authorities. In *Woods* v. *Durable Suites Ltd.*[5] counsel for the plaintiff was seeking to rely on a previous decision in a negligence action. Singleton L.J. said this[6]: "That was a case of the same nature as that "which is now under appeal. It is of the greatest importance "that it should be borne in mind that though the nature of the "illness and the nature of the work are the same, the facts "were quite different. Mr. Doughty claims that the decision of "this court in *Clifford* v. *Charles H. Challen & Son Ltd.*[7] lays "down a standard to be adopted in a case of this nature. In "other words, he seeks to treat that decision as deciding a "question of law rather than as being a decision on the facts "of that particular case."

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[2] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[3] [1953] A.C. 643; [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.

[4] [1953] A.C. 180; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110.

In the present case, and I am not criticising him, the learned county court judge felt himself bound by certain observations in different cases which were not, I think, probably intended by the learned judges to enunciate any new principles or gloss on the familiar standard of reasonable care. It must be a question on the evidence in each case whether, assuming a duty to provide some safety equipment, there is a duty to advise everyone, whether experienced or inexperienced, as to its use.

Whether or not the learned judge was misled by authorities, there remains the question whether the defendants failed in their duty in not advising or seeking to educate the plaintiff in the use of spats. The point on which the plaintiff succeeded was not pleaded. The plaintiff's main case was that a gangway was obstructed. He was not believed on that. He alleged a failure to provide spats. They were provided, as the judge found, to the plaintiff's knowledge. If the plaintiff had alleged in his particulars of negligence a failure to advise him or educate him in their use it may well be that this would have been gone into more fully in the examination and cross-examination of the witnesses. The point not having been pleaded, it would be wrong to draw inferences adverse to the defendants which might well have been answered in evidence if the point had been pleaded.

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[5] [1953] 1 W.L.R. 857; [1953] 2 All E.R. 391.

[6] [1953] 1 W.L.R. 857, 860.

[7] [1951] 1 K.B. 495; [1951] 1 T.L.R. 234; [1951] 1 All E.R. 72.

Parker L.J., for example, assumed that the plaintiff was not told when he entered the defendants' employment that spats were available. This would suggest that there was no general practice in other foundries of providing spats, or the plaintiff would have assumed their provision. This would be a point in the defendants' favour. It may have been obvious at once from the number of men wearing spats, as stated by Mr. Darby, that spats were there for the asking. I would like to suggest that when a point not pleaded is allowed to be taken in the Court of Appeal, an amendment should be drafted whether or not the case seems likely to reach this House. To see the allegation in terms often assists.

I have come to the conclusion that the learned judge's first impulse was the right conclusion on the facts as he found them, and for the reasons which he gives. I will not elaborate these reasons or someone might cite my observations as part of the law of negligence.

LORD DENNING. My Lords, in 1944 du Parcq L.J. gave a warning which is worth repeating today: "There is danger, "particularly in these days when few cases are tried with juries, "of exalting to the status of propositions of law what really are "particular applications to special facts of propositions of ordinary "good sense"; see *Easson* v. *London & North Eastern Railway Co.*[8]

In the present case the only proposition of law that was relevant was the well-known proposition—with its threefold sub-division—that it is the duty of a master to take reasonable care for the safety of his workmen. No question arose on that proposition. The question that did arise was this: What did reasonable care demand of the employers in this particular case? That is not a question of law at all but a question of fact. To solve it the tribunal of fact—be it judge or jury—can take into account any proposition of good sense that is relevant in the circumstances, but it must beware not to treat it as a proposition of law. I may perhaps draw an analogy from the Highway Code. It contains many propositions of good sense which may be taken into account in considering whether reasonable care has been taken, but it would be a mistake to elevate them into propositions of law.

Applying this to the present case: You start with the fact

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[8] [1944] K.B. 421, 426; 60 T.L.R. 280; [1944] 2 All E.R. 425.

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that, when a moulder in an iron foundry carries a ladle full of hot molten metal and pours it into the moulding box, there is a danger that the hot metal may splash over onto his feet. In order to safeguard him from injury, the employers ought, I should have thought, to provide protective footwear for him. But in saying so, I speak as a juryman, for it is not a proposition of law at all, only a proposition of good sense. If the employers fail to provide protective footwear, the tribunal of fact can take it into account in deciding whether the employers took reasonable care for the safety of their men: and it was so taken into account by Gerrard J.,[9] Gorman J.[10] and Stable J.[11] in the three cases of which transcripts were provided. In each case the employers were held at fault.

But the question here is not whether the employers ought to provide protective footwear for the men—for they clearly did so. The question is whether, having provided spats and boots, they ought to go further and *urge* the men to wear them. Here too I should have thought that the employers ought to advise and encourage the men to wear protective footwear. But again I speak as a juryman and not as a judge: because it is not a proposition of law at all, but a proposition of good sense. And that is the very point where the county court judge fell into error. He treated it as matter of strict law. He thought that, as this man "was never told that they must be worn," he was *bound by authority* to find that the employers were negligent. He treated it almost as ~~on~~ a par with a statutory regulation: whereas it was nothing of the kind. The distinction was taken by Lord Wright 25 years ago: "Whereas at the ordinary law "the standard of duty must be fixed by the verdict of a jury, "the statutory duty is conclusively fixed by the statute"; see *Lochgelly Iron & Coal Co. Ltd.* v. *McMullen.*[12] So here, this being a case governed by the common law and not by any statute or regulation, the standard of care must be fixed by the judge as if he were a jury, without being rigidly bound by authorities. What is "a proper system of work" is a matter for evidence, not for law books. It changes as the conditions of work change.

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[9] *Bilsbury* v. *Harrison McGregor & Guest Ltd.* (1955) Unrep., January 18 (Manchester Assizes).

[10] *Brooker* v. *Jenkins Brothers Proprietors Ocean S.S. Co. Ltd.* (1956) Unrep., February 20 (Liverpool Assizes).

[11] *Webb* v. *Smith Bingley & Evans Ltd.* (1956) Unrep., December 18 (Birmingham Assizes).

[12] [1934] A.C. 1; 49 T.L.R. 566.

The standard goes up as men become wiser. It does not stand still as the law sometimes does.

I can well see how it came about that the county court judge made this mistake. He was presented with a number of cases in which judges of the High Court had given reasons for coming to their conclusions of fact. And those reasons seemed to him to be so expressed as to be rulings in point of law: whereas they were in truth nothing more than propositions of good sense. This is not the first time this sort of thing has happened. Take accidents on the road. I remember well that in several cases Scrutton L.J. said that " if a person rides in the dark he must " ride at such a pace that he can pull up within the limits of " his vision " (*Baker* v. *E. Longhurst & Sons Ltd.*[13]). That was treated as a proposition of law until the Court of Appeal firmly ruled that it was not (*Tidy* v. *Battman*[14]; *Morris* v. *Luton Corporation*[15]). So also with accidents in factories. I myself once said that an employer must, by his foreman, " do his best to " keep [the men] up to the mark " (*Clifford* v. *Charles H. Challen & Son Ltd.*[16]). Someone shortly afterwards sought to treat me as having laid down a new proposition of law, but the Court of Appeal, I am glad to say, corrected the error (*Woods* v. *Durable Suites Ltd.*[17]). Such cases all serve to bear out the warning which has been given in this House before. " . . . we ought " to beware of allowing tests or guides which have been suggested " by the court in one set of circumstances, or in one class of " cases, to be applied to other surroundings," and thus by degrees to turn that which is at bottom a question of fact into a proposition of law. That is what happened in the cases under the Workmen's Compensation Act, and it led to a " wagon-load of " cases "; see *Harris* v. *Associated Portland Cement Manufacturers Ltd.*[18] by Lord Atkin. Let not the same thing happen to the common law, lest we be crushed under the weight of our own reports.

Seeing, then, that the county court judge fell into error, what should the Court of Appeal have done? The answer seems to me this: the Court of Appeal should have done as the judge would have done if he had not felt bound by authority. He would have found that the employers had not been guilty of negligence. True it is that, by the time the case reached the

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[13] [1933] 2 K.B. 461, 468.

[14] [1934] 1 K.B. 319.

[15] [1946] K.B. 114; 62 T.L.R. 145; [1946] 1 All E.R. 1.

[16] [1951] 1 K.B. 495.

[17] [1953] 1 W.L.R. 857.

[18] [1939] A.C. 71, 78; 55 T.L.R. 302; [1938] 4 All E.R. 831.

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Court of Appeal, the primary facts were all ascertained, and the only issue was what was the proper conclusion from those facts. So the court was right to review it, but still it should give proper weight to the judge's view. Since the case of *Benmax* v. *Austin Motor Co. Ltd.*[19] the Court of Appeal no longer takes refuge in that most unsatisfactory formula: "Although we should not have come to the same conclusion "ourselves, we do not think we can interfere." If the Court of Appeal would not have come to the same conclusion themselves, it does what the Court of Appeal ought to do—what it is there for—it overrules the decision. But short of that, it should accept the conclusions of fact of the tribunal of fact. In this case I would not myself be prepared to differ from the judge's view that there was no negligence on the part of the employers in regard to this particular workman. He knew all there was to know, without being told; and he voluntarily decided to wear his own boots, which he had bought for the purpose.

Only one word more. It is on causation. Even if it had been the duty of the employers to urge this workman to wear spats, I do not think their omission should be taken to be one of the causes of the accident. It is often said that a person who omits to do his duty "cannot be heard to say" that it would have made no difference even if he had done it: see *Roberts* v. *Dorman Long & Co. Ltd.*[20] But this is an overstatement. The judge *may* infer the omission to be a cause, but he is not bound to do so. If, at the end of the day, he thinks that, whether the duty was omitted or fulfilled, the result would have been the same, he is at liberty to say so. So here, this workman, after he recovered from the injury, went back to work and did the same as before. He never wore spats. If the warning given by the accident made no difference, we may safely infer that no advice beforehand would have had any effect.

I would allow the appeal.

Appeal allowed.

Solicitors: *Berrymans; W. H. Thompson.*

F. C.

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[19] [1955] A.C. 370; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326.

[20] [1953] 1 W.L.R. 942, 946; [1953] 2 All E.R. 428.

[HOUSE OF LORDS.]

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1959
May 4, 5, 6;
June 18.

LYLE & SCOTT LTD. . . . . . . APPELLANTS;
AND
SCOTT'S TRUSTEES . . . . . . RESPONDENTS.

SAME . . . . APPELLANTS;
AND
BRITISH INVESTMENT TRUST LTD. . . RESPONDENTS.

Company—Shares—Transfer—Restrictions in articles of association—Pre-emptive right of other members—Shareholder "desirous of "transferring" shares—Meaning of "transfer"—Contract by shareholder for sale of shares to third party—Violation of article—Company's right to enforce pre-emptive provisions.

By article 9 of the articles of association of a private company "no registered shareholder of more than one per centum of the "issued ordinary share capital of the company shall, without the "consent of the directors, be entitled to transfer any ordinary "share for a nominal consideration or by way of security and no "transfer of ordinary shares by such a shareholder shall take place "for an onerous consideration so long as any other ordinary share-"holder is willing to purchase the same at a price which shall be "ascertained by agreement between the intending transferor and "the directors and, failing agreement, at a price to be fixed by "the auditor of the company. . . . Any such ordinary shareholder "who is desirous of transferring his ordinary shares shall inform "the secretary in writing of the number of ordinary shares which "he desires to transfer. . . ."

By article 7 the directors might in their absolute discretion, without assigning any reason, decline to register any transfer of any share.

The registered holders of ordinary shares in the company (being more than one per cent of the issued ordinary share capital) entered into an agreement with a third party under which they received and retained £3 for each £1 share binding themselves (inter alia) to vote as he desired, so as to put him as fully in control of the company as they could without registering transfers of the shares. The company sought declarator that these shareholders were bound to implement the terms of article 9 and decree ordaining them forthwith to do so:—

Held, that the admitted actings of the shareholders were such that it could be inferred that they were "desirous of transferring" their shares within the meaning of article 9. A shareholder who has agreed to sell his shares and has received and retains the price must be deemed to be desirous of transferring them; otherwise the purpose of the article would be defeated; accordingly, the shareholders were bound to implement article 9.

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

Decision of the First Division of the Court of Session, 1958 S.C. 230 reversed.

Appeals from the First Division of the Court of Session.

The appellants in both appeals were Lyle & Scott Ltd., a limited company, and the respondents in the first appeal were Mrs. Norah A. Scott, James Wright and Guy Hepburn Armstrong, trustees and executors of the late John P. Scott. The appellants in this action sought (1) "declarator that the "[respondents] in respect that they are holders of ordinary "shares of Lyle & Scott Ltd. amounting to more than one per "cent. of the issued ordinary share capital of the said company "and are desirous of transferring the said ordinary shares for "an onerous consideration, are bound to implement the terms "of article 9 of the articles of association of the said company "and that by informing the secretary of the said company in "writing of the number of ordinary shares which they desire "to transfer" and (2) decree against the respondents ordaining them "forthwith to implement the terms of the said "article 9 by informing the said secretary in writing of the "number of ordinary shares which they desire to transfer." There were also certain conclusions for interdict which were subsequently departed from and with which this appeal was not concerned. Each party tabled a plea to the relevancy of the other's averments and, following a debate on these pleas, the Lord Ordinary (Lord Strachan) by interlocutor dated October 30, 1957, dismissed the action quoad the above-mentioned conclusions. The appellants reclaimed against this interlocutor and by interlocutor dated February 14, 1958, the First Division unanimously refused the appellants' motion for review and adhered to the Lord Ordinary's interlocutor. The appellants now submitted these interlocutors for review and the respondents submitted that the interlocutors were well founded and should be affirmed by the House of Lords.

In the second appeal the respondents were British Investment Trust Ltd. and were selected as representing a group of eight investment trusts against each of whom the appellants raised actions in identical terms concluding for declarator and specific implement.

The facts in the first appeal, stated by Viscount Simonds.

were as follows: The respondents, hereafter called "Scott's trustees," were in November, 1956, and remained the registered holders of a number of ordinary shares of the appellant company. The precise number was not disclosed, but it was more than one per cent. of the issued ordinary share capital. That being so, their power to dispose of the shares was limited by certain of the articles of association of the company.

Article 7 provided that the directors might in their absolute discretion and without assigning any reason therefor decline to register any transfer of any share, whether or not it was a fully paid share. Article 8 provided that subject to the provisions of articles 7 and 12 ordinary shares might be dealt with by an ordinary shareholder by way of transfer or bequest to, or conveyance to trustees for behoof of certain relations with or without any consideration being paid. Article 9 was that upon which this appeal turned: "Subject to the provisions of clauses 7, "8 and 12 no registered holder of more than one per centum "of the issued ordinary share capital of the company shall, "without the consent of the directors, be entitled to transfer "any ordinary share for a nominal consideration or by way "of security, and no transfer of ordinary shares by such a "shareholder shall take place for an onerous consideration so "long as any other ordinary shareholder is willing to purchase "the same at a price, which shall be ascertained by agreement between the intending transferor and the directors and, "failing agreement, at a price to be fixed by the auditors of "the company for the time being. Any such ordinary shareholder who is desirous of transferring his ordinary shares shall "inform the secretary in writing of the number of ordinary "shares which he desires to transfer, and the price shall immediately be fixed as aforesaid. Thereafter the secretary shall "intimate the same to all the other holders of ordinary shares "simultaneously by written notice containing particulars of the "intending transfer. Thereafter each ordinary shareholder receiving such notice shall be entitled, within fourteen days from "the date of the notice, to intimate in writing to the secretary "that he offers to purchase some or all of the shares mentioned "in the intimation made to him; otherwise he shall not be a "party to the offer. On the expiry of the foresaid fourteen days' "notice, the secretary shall report the result to the directors "who shall divide and appropriate the shares specified in the "notice among the offerers in proportion to the number of "ordinary shares held by them respectively or as near thereto

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"as possible, provided that no offerer shall have apportioned to "him a greater number of shares than he has offered to purchase. "If any difficulty shall arise in apportioning the said shares or "any of them, the directors may appropriate the shares in respect "of which such difficulty arises among the offerers in such "manner as they think fit or otherwise in their sole discretion. "If after intimation by the secretary to the ordinary shareholders "in manner aforesaid the number of shares offered to be purchased by them shall be less than the number of shares, which "the intending transferor gave notice of his desire to transfer, "or if offering ordinary shareholders shall fail to complete their "purchase of such shares as shall be appropriated to them "within one month after the date of such appropriation, the "intending transferor may transfer the shares undisposed of to "any person, whether a member of the company or not, as he "thinks proper, provided that he shall not take for them less "than the price to be ascertained as aforesaid without first offering them in manner aforesaid to the other ordinary shareholders "at such lower price." Articles 10, 11 and 12 also dealt with transfer or transmission of shares but there was nothing in them relevant to this appeal.

In these circumstances in November, 1956, Scott's trustees and all other shareholders of the company were approached by a firm of solicitors acting on behalf of a principal, who, though his name was then undisclosed, later proved to be a Mr. Hugh Fraser, with a written offer to purchase their shares. The offer was expressed to be subject to certain terms and conditions, of which the first was that the offer was conditional upon acceptance by the holders of 75 per cent. of the ordinary shares then in issue or such lesser proportion as their clients might in their absolute discretion accept as sufficient, and the second that the price for each ordinary share should be £2 10s. and should be inclusive of any ordinary dividend declared subsequent to the date thereof and that the price for each preference share should be 20s. with a similar provision in regard to dividend. Then there was a condition about holdings of both ordinary and preference shares, and then this condition: "The price shall be satisfied by payment "in cash on or after December 18, 1956, against delivery of valid "and effective transfers of the said ordinary and/or preference "shares together with the relative share certificates and a general "proxy in favour of our clients' nominee." Certain other conditions were expressed to which reference need not be made, and lastly it was provided that: "Acceptances of this offer must be "received by us not later than first post on November 27, 1956, "on the enclosed form of acceptance duly signed by you." By a subsequent letter the price offered for each ordinary share was increased to £3 and the time for acceptance was extended.

By the enclosed form of acceptance, which was signed by Scott's trustees and returned by them, they agreed, subject to the terms and conditions of the offer, to sell to the client of their correspondents their holdings in the company at the price of 20s. for preference shares and 60s. for ordinary shares. They further agreed that in the event of the offer becoming unconditional according to its terms they authorised them to use the enclosed form of proxy and they also agreed to deliver up their share certificates in respect of all their shares in the company which they had agreed to sell and to sign the relative transfer deeds when called upon to do so in exchange for the price. On or about December 4, 1956, they were informed by the said solicitors that a majority of the shareholders had accepted the offer and that the acceptances were no longer open for rejection.

On or about December 20, 1956, the purchaser, hereafter referred to as "Mr. Fraser," paid Scott's trustees £3 for each ordinary share and £1 for each preference share held by them and they delivered to him or his agent the relative share certificates and a completed form of general proxy.

The appellants, learning of these proposed transactions, called the attention of Scott's trustees to the terms of article 9 by letters of December 5 and 14, 1956, and, finding that their letters were ignored, on December 31, 1956, raised the action against Scott's trustees out of which this appeal arose and at the same time raised similar actions against 12 other shareholders who had accepted Mr. Fraser's offer.

In the closed record the pursuers' (appellants') fifth plea-in-law was that "the defences being irrelevant should be repelled." The defenders' (respondents') first plea-in-law was that "the "pursuers' averments being irrelevant et separatim lacking in "specification the action should be dismissed."

Sir E. Milner Holland Q.C. (of the English Bar), *I. M. Robertson Q.C.* (of the Scottish Bar), *Philip Sykes* (of the English Bar) and *Henry Keith* (of both Bars) for the appellant company. By reason of the provisions of the articles of association, the respondents were not entitled to enter into these contracts for the sale of their shares. Article 9 was intended to secure to the other shareholders a pre-emptive right, the right to purchase the shares sold by other shareholders. It has two parts. (1) The first prohibits transfers of shares, including transfers of the beneficial interest; it was designed to prevent just what has been attempted here. (2) Secondly, there is a positive obligation designed to implement the first part. The appellant company only seeks to compel the observance of what article 9 says should be done, to bring the shareholders to the point of honouring their bargain with the company. This is not a case where a person can give a good title to another in violation of his contract with the company. The respondents say that they are not "desirous of transferring" their shares under the article but merely wish to transfer them to Fraser on the terms he has offered. But they have received the price of £3 a share from him and have not sought to resile from their contracts with him. This necessarily means that they are "desirous of transferring" their shares within the meaning of article 9, and so they are bound to inform the secretary and set in motion the provisions of the article under which the shareholders are entitled to an opportunity of purchasing their shares. They are attempting to transfer their shares in breach of the article. As a matter of language article 9 is unqualified and is quite general. By the form of acceptance signed by the respondents they agreed to sell their holdings and deliver up their certificates. That was not in accordance with article 9. Entering into such a contract of sale is an expression of desire to sell the shares held sufficient to satisfy the test of "desirous" in the article, and the member of the company so doing can be compelled to offer his shares for sale to the other members in accordance with the article. As to the enforcement of such an article as this, see *Rayfield* v. *Hands*.[1]

The first question in this case is whether the article has been infringed. The answer is that it has. The second question is whether the appellants are entitled to the remedy which they seek in their conclusions, (1) declarator that the respondents are bound to implement the terms of article 9 by informing the secretary of the company of the number of shares which they desire to transfer; (2) decree ordaining them to implement the terms of article 9. The right course is to order the respondents to comply with the article, which they have failed to do, by giving the prescribed notification.

Ian Shearer Q.C. and *Peter Maxwell* (both of the Scottish

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[1] [1958] 2 W.L.R. 851; [1958] 2 All E.R. 194.

Bar) and *Arthur Bagnall* (of the English Bar) for the first respondents. On the first question, on the true construction of article 9 the only transactions affected are transfers of shares in the ordinary business sense, that is, transfers leading to the cessation of the transferor's membership and the substitution of the transferee. Nothing short of that is affected by article 9. The prohibition is that no registration of an instrument of transfer shall take place. The shareholder desirous of transferring his shares is one desirous of registering an instrument of transfer, and at the present time the respondents are not so desirous, nor is the purchaser. Article 9 provides for no pre-emptive rights such as the appellants contend for. It provides a shareholder with a way to sell his shares but does not compel him to do so. In construing article 9 one must decide what the article achieves, not what it aims at achieving. Whether a company be public or private, any restriction on the right to transfer shares must be clearly expressed and placed beyond reasonable doubt: *Shepherd's Trustees* v. *Shepherd.*[2] Any member may vote as he pleases and may sell his voting power. Restrictions on the rights of property in shares or prohibitions as to their use contained in any article must be clear: *Pender* v. *Lushington.*[3]

It is not disputed that the respondents have parted with the beneficial interest in their shares. The question is whether the terms of article 9 are such as to prohibit a member of a company from carrying out a transaction, involving an agreement to sell his shares, which he could normally carry out unless the articles forbade it. The sole effect of article 9 is that it specifies the only machinery by which a shareholder can transfer his shares in a complete and proper sense. The operation of legally transferring shares involves several distinct steps, each one an essential part of the operation: (1) a contract of sale; (2) payment of the price by the prospective transferee in exchange for an instrument of transfer or certificate; (3) the presentation of the instrument of transfer to the board of the company and its acceptance by the board; (4) the entry of the transferee on the register of the company in place of the transferor. The last two steps were not taken or attempted here.

As to the construction of the word "transfer," see *In re Copal Varnish Co. Ltd.*[4] The words "transfer which would increase "the number of members" in article 2 (*a*) of the articles of the

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[2] 1950 S.C.(H.L.) 60, 65–66, 66–67, 70–71; [1949] 2 All E.R. 1044, 1050, 1051, 1054.

[3] (1877) 6 Ch.D. 70, 72, 74, 75.

[4] [1917] 2 Ch. 349, 350, 353–354.

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respondent company indicates the meaning of the word "transfer" in article 9. See also Palmer's Company Precedents, 17th ed., vol. I, p. 764, and *Stevenson* v. *Wilson*.[5] The proper remedy of the company here is to refuse to register the transfer. The offer of the respondents in such a case as this to sell their shares may be withdrawn before acceptance: *Smith* v. *Wilson*.[6] An article such as this has no effect on a sale of the beneficial interest in shares: *Hunter* v. *Hunter*.[7]

On the assumption that this article applies to an agreement for the sale of shares, the next question is whether, on the facts averred, the respondents are "desirous of transferring" these shares within the terms of the article. The control provisions of article 9 only come into operation when a member voluntarily informs the secretary of his desire to transfer his holding. It is common ground that there must be an overt act indicating such a desire. The contract here entered into is not an expression of such a desire within the article. It is evidence of a desire to transfer to Fraser at Fraser's price, but not a desire to transfer to the other shareholders at a price fixed by the directors or by the company's auditors. It was not a general desire to transfer. No right to receive an offer of the shares arises under this article at least until the intending transferor takes steps to set the machinery of the pre-emption clause in motion: see *Homfray* v. *Fothergill*[8] and *Shepherd's Trustees* v. *Shepherd*.[9]

Assuming that the contracts here are evidence of an overt desire to transfer the stock, the question arises whether the respondents are presently desirous of transferring it. That is vital to the appellants' case. But they cannot aver that the respondents are now desirous of transferring their shares, because, on the appellants' own averments, they have already done so and therefore the desire is satisfied. If the contract with Fraser amounts to a "transfer" within the prohibition of article 9, the respondents have already transferred their shares and can no longer be desirous of doing so. Alternatively, if the contract with Fraser does not amount to a transfer, the respondents have no present intention of taking any further steps than they have already done.

The grounds on which the courts below reached their decision are expressed by the Lord Ordinary and by the Lord President. Lord Russell and Lord Sorn.[10]

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[5] 1907 S.C. 445.

[6] (1901) 9 S.L.T. 137.

[7] [1936] A.C. 222.

[8] (1866) L.R. 1 Eq. 567.

[9] 1950 S.C.(H.L.) 60, 65, 66–67; [1949] 2 All E.R. 1044, 1050, 1051.

As to the remedy open to the appellants should the House be against the respondents on the other points, the courts in Scotland will not grant a decree when the act ordered can be immediately undone by the person to whom the order is directed. If the respondents were ordered to do something other than transfer their shares to Fraser, the symbol of their desire to transfer (the contract with Fraser) would become irrelevant, and so the overt act would become valueless for the purposes of this action. Thus an effective result would not ensue and, in those circumstances, the courts in Scotland would not grant decree, since the notice to the company could be immediately withdrawn.

Arthur Bagnall following. The question whether the transaction with Fraser was a breach of the prohibitive provisions of article 9 is one of construction. The question is whether a "transfer" of shares has taken place.

It is submitted: (1) The question is not what transactions the words in article 9 are aimed at, but what they fairly hit. (2) If there is any ambiguity in the article, it should be construed in a sense which least interferes with the shareholders' freedom to deal with their shares. (3) The only relevant consideration is who are on the register: see regulation 7 of Table A (Buckley on the Companies Acts, 13th ed., p. 793). (4) The legal concept of ordinary shares is that they are choses in action, a bundle of rights enjoyed by the holder vis-à-vis the company, importing corresponding duties towards the company. No transaction is a transfer of ordinary shares which does not vest in the transferee all the rights and impose on him all the obligations of the transferor. By that test there was no transfer here. If someone who wished to confer the benefit of certain shares on his wife executed a declaration of trust in her favour, no transfer would thereby take place, although the beneficial interest would have gone from the shareholder.

In re Copal Varnish Co. Ltd.[11] suggests that there was no transfer here. See also *Hunter* v. *Hunter*,[12] which indicates that the majority of the House of Lords would have held that there was no transfer here.

W. R. Grieve Q.C. and *John Dick* (both of the Scottish Bar) for the second respondents. There is no concession that these respondents are in breach of article 9. They stand on that part of the judgments in the court below which resulted in the action being dismissed on the ground that the remedy sought by the appellants was one to which they are not entitled. On this point they adopt the argument for the first respondents.

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[10] 1958 S.C. 230, 234–235, 243–244, 247–248, 249–250.

[11] [1917] 2 Ch. 349, 352, 354.

[12] [1936] A.C. 222, 229, 247.

The appellants must decide what they really say about the contract with Fraser. They do not say it is a nullity; therefore the whole basis of their argument disappears, since any desire evinced to transfer these shares would be ineffective. The appellants did not make any submission as to the respondents' position vis-à-vis Fraser, but they must do so in order to show what the effect of the contract will be. In certain circumstances Fraser could prevent the registration of any other transfer, so that the remedy sought by the appellants would be ineffective.

There was here a purely subjective desire to sell the shares but no overt act of notification within article 9. The appellants do not allege that there was a valid and effective transfer. There is not a sufficient intimation to make it obligatory on the respondents to put article 9 into operation.

Sir Milner Holland Q.C. in reply. As to the right of pre-emption, see *Homfray* v. *Fothergill.*[13] The respondents cannot be entitled to withdraw the notice they must give to the company so long as they have not cancelled the contract with Fraser. That contract indicates a desire to sell and, so long as they maintain it, it would be a contempt of the order which the House of Lords is asked to make to withdraw notice given to the company. Accordingly, the making of that order would not be ineffective. The respondents are in breach of article 9 in failing to give the secretary of the company the notice prescribed by the article. It does not matter whether or not what has already been done amounts to a transfer. The point is that the respondents are desirous of transferring their shares.

The cases cited by the respondents are not to the point because the companies there were not concerned with the present question.

On the pleadings it is clear what the appellants are asking for.

Their Lordships took time for consideration.

June 18. Viscount Simonds, having stated the facts, continued: My Lords, I can pass over the next skirmish between the parties, which took the form of an attempt by certain shareholders, who had sold their shares, to remove three of the directors from the board of the company and substitute others of their or Mr. Fraser's choice. This attempt met the failure that it deserved and so the action proceeded.

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[13] L.R. 1 Eq. 567, 573–574.

It is convenient now to refer to those conclusions of the summons which are still alive, for the appellants have so far failed upon the ground that, though the provisions of article 9 have been breached by Scott's trustees, they have not established their right to the remedy they have claimed.

Conclusions 1 and 2 of the summons are as follows: "1. For "declarator that the defenders, in respect that they are the "holders of ordinary shares of Lyle & Scott Ltd. amounting to "more than one *per centum* of the issued ordinary share capital "of the said company and are desirous of transferring the said "ordinary shares for an onerous consideration, are bound to "implement the terms of article 9 of the articles of association "of the said company and that by informing the secretary of "the said company in writing of the number of ordinary shares "which they desire to transfer. 2. For decree ordaining the "defenders forthwith to implement the terms of the said article "9 by informing the said secretary in writing of the number of "ordinary shares which they desire to transfer."

At the hearing before the Lord Ordinary, as also at that before the First Division, the debate appears to have been divided into two parts. First, it was questioned whether Scott's trustees had been guilty of a breach of the first or prohibitive part of article 9, a question answered in the affirmative by the Lord Ordinary and the learned judges of the First Division who thought fit to answer it. But, secondly, it was asked whether, upon this assumption, the appellants were entitled to the remedy they sought, and here they had no voice in their favour. This was, no doubt, a convenient way of examining the curious problem which arises in this case, but it was perhaps apt to obscure the vital question whether upon the facts which I have set out Scott's trustees are to be deemed to be shareholders desirous of transferring their ordinary shares within article 9. If they were, the appellants would be entitled to their relief, whether or not what Scott's trustees had done was a breach of the first part of the article.

I do not dissent, my Lords, from the opinion expressed by the Lord Ordinary and the Lord President and Lord Russell in the First Division that Scott's trustees had been guilty of a breach of this part of the article. The determination of this question rests on the meaning to be assigned to the word "transfer" where it there occurs. But I do not think it necessary to express a final opinion upon it, for, as I have said, the question is not whether what has been done is a breach of the first part of the article but whether it demonstrates with sufficient clearness that Scott's trustees are persons desirous of transferring their ordinary shares. It appears to me that there is no room for doubt that that is just what they are. Here I can proceed on their admissions. For, since it is the admitted fact that they entered into the agreement for sale of their shares and have received and retain the price, it follows that, whether or not they have yet done all that they ought as vendors to do, they hold the shares as trustees for the purchaser. They are bound to do everything that in them lies to perfect the title of the purchaser. They cannot compel the company to register him as the holder of the shares, but everything else they must do, and it is straining credulity too far to suppose that everything else would not already have been done, if it had not been hoped to gain some tactical advantage by delay. In my opinion, it is not open to a shareholder, who has agreed to do a certain thing and is bound to do it, to deny that he is desirous of doing it. I wish to make it quite clear, for it goes to the root of the matter, that I regard Scott's trustees as desirous of transferring their ordinary shares unless and until their agreement with Mr. Fraser has been abrogated. Of this at least one acid test would be the return by them of the price they have received.

Against this view it was urged that they were not desirous of transferring their shares within the meaning of the article because they had not a general desire but a particular desire to transfer only to Mr. Fraser at a certain price. This makes nonsense of the article, the purpose of which would be wholly defeated if it did not apply to a desire to transfer to a particular person, who might be the person whom the company particularly wished to exclude. Then it was contended that they were not desirous of transferring their shares, because their task had been done and their desire satisfied. I think, my Lords, that this ingenious and almost humorous plea ignores that they have elsewhere pleaded and vigorously relied on the fact that the transfer has not been completed. This plea had perhaps not been thought of when they decided not "at the present time" to have deeds of transfer executed.

If, then, Scott's trustees are, as I hold they are, shareholders desirous of transferring their ordinary shares, what follows? It is at this point that I am constrained to differ from the opinions

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of the learned judges in the courts below. I cannot, for instance, accept the view of the Lord President that there has been no overt act which could enable the company to require the defenders to follow out the procedure in the article, nor do I find it easy to reconcile this part of his judgment with his decision that Scott's trustees had infringed the article by transferring or purporting to transfer their shares to Mr. Fraser. What more conspicuous overt act, evincing the desire to transfer, could there be than this? I must agree with Lord Sorn that there may in some cases be difficulty in determining when a shareholder begins to be desirous and when he ceases to be desirous and at what stage he is at liberty to change his mind. I will therefore say something on this aspect of the case. I have already indicated that a shareholder who has agreed to sell his shares and has received the price is to be deemed to be desirous of transferring them. At once, therefore, the machinery of the article is put in motion and he must inform the secretary of the number that he desires to sell, which is ex hypothesi the number he has agreed to sell. The price is then fixed in the manner prescribed by the article and so the matter proceeds. But can he at any stage change his mind, abandon his desire, and stop the machinery? I have already indicated that his desire must be deemed to continue so long as he adheres to his contract of sale. I do not wish to be dogmatic upon a question which may be the subject of other proceedings. But I will add that the onus will be on him to satisfy the company and, if necessary, the court that his desire is spent and his proof must be cogent. If he succeeds in this and if the machinery has not operated so far that a contract has been made with the other shareholders, it appears to me that he can withdraw his offer—for that is what the intimation that he desires to sell amounts to. I do not at all dissent from the view expressed in *Smith* v. *Wilson* [1] that an offer made in pursuance of an article of this kind may be timeously withdrawn, what is timeous depending, of course, on the language of the particular article. He is thus placed in the same position as any other shareholder who wishes to sell his shares in the manner prescribed by the article if he can get a satisfactory price for them. That is the bargain he made when he became a shareholder and he must abide by it. What he cannot be permitted to do is to adhere to his contract and in the same breath assert that he does not desire to transfer his shares. It may well be that he thus places himself in a position of disadvantage vis-à-vis the purchaser with whom he has contracted. But it cannot be denied that he has done so with his eyes open.

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[1] 1901, 9 S.L.T. 137.

I would therefore allow the appeal with costs here and below. The order will be in the form which my noble and learned friend, Lord Reid, has prepared, and will intimate to the House.

My Lords, in the second case, *Lyle & Scott Ltd.* v. *British Investment Trust Ltd.*, the respondents are shareholders of the appellant company and hold more than 1 per cent. of its issued ordinary shares. I cannot in any relevant matter distinguish this case from that of Scott's trustees with which the House is dealing. The same order must, in my opinion, be made.

Lord Reid. My Lords, in these two actions the pursuers and appellants are a private company whose articles of association contain provisions restricting the transfer of shares. The company carry on a knitwear and hosiery business in Hawick. In each case the defenders and respondents are shareholders of the company. On November 6, 1956, a firm of solicitors in Edinburgh, acting on behalf of a client then undisclosed but now known to be Mr. Hugh Fraser, sent to all the shareholders letters offering to purchase their shares, the offer being conditional on acceptance by the holders of 75 per cent. of the ordinary shares. The price offered was £2 10s., which was subsequently increased to £3 per share, and this was to be payable against valid and effective transfers and a general proxy in favour of the purchaser's nominee. Both respondents accepted the offer by completing and returning the form of acceptance sent to them and also completing a form of proxy. In the acceptance they agreed to sell their shares, authorised the use of the proxy, and agreed to deliver up their share certificates and to sign transfer deeds when called on in exchange for the price.

On December 31, 1956, the appellants raised actions against the respondents and about ten other shareholders who had accepted the offer. On January 22, 1957, their secretary received notices requisitioning a general meeting of the company for the purpose of removing three of the directors and appointing Mr. Fraser and two others whom he wished to have appointed. Conclusions for interdict were then added and interim interdict was granted to prevent the defenders from voting at the meeting. I need not deal further with this matter because there is now no conclusion for interdict in these cases: we were informed that other proceedings are pending between the parties.

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The appellants' case is that by reason of the provisions of the articles the respondents were not entitled to enter into these contracts for the sale of their shares. Article 7 permits the directors in their absolute discretion to decline to register any transfer of any share. Article 8 permits transfer or bequest to or conveyance to trustees for behoof of certain relatives of a shareholder. Article 12 deals with shares held by employees of the company. The article which is important in this case is article 9, which is in these terms: [His Lordship read the article and continued:]

The respondents are each holders of more than 1 per cent. of the ordinary shares, and it is clear from their defences that they have received the price of £3 per share and that they have not attempted to resile from their contracts with Mr. Fraser. The appellants maintain that this necessarily means that they are desirous of transferring their shares within the meaning of this article, and that they are therefore bound so to inform the secretary of the company so as to set in motion the provisions of the article under which the other shareholders are entitled to have an opportunity to purchase any share which any shareholder is desirous of transferring. The only conclusions of the summons now in issue are for declarator that the defenders, in respect that they are desirous of transferring their shares, are bound to implement the terms of article 9 and for decree ordaining them forthwith to do so by informing the secretary of the number of ordinary shares which they desire to transfer.

The Lord Ordinary, Lord Strachan, and the First Division have held that the respondents have contravened the provisions of article 9, but that the appellants are not entitled to the remedy which they seek. Before your Lordships the appellants supported the first of these findings but maintained that the second was erroneous. One at least of the respondents maintained that the appellants' averments disclose no breach of article 9: both support the decision of the Court of Session that the remedy which the appellants seek should not be granted.

I have come to the conclusion without difficulty that on their own admissions the respondents are in breach of article 9. The purpose of the article is plain: to prevent sales of shares to strangers so long as other members of the company are willing to buy them at a price prescribed by the article. And this is a perfectly legitimate restriction in a private company. But the respondents argue that, whatever may have been the intention, the terms of the article are such that it has only very limited application. They say that "transfer" and "transferring" only apply to a complete transfer of the ownership of shares by acceptance and registration of deeds of transfer, and that a shareholder who agrees to sell his shares is quite entitled to do so and to receive the price and vote as the purchaser wishes so long as he is not desirous of having a transfer registered.

I see no reason for reading the article in that limited way. Transferring a share involves a series of steps, first an agreement to sell, then the execution of a deed of transfer and finally the registration of the transfer. The word transfer can mean the whole of those steps. Moreover, the ordinary meaning of "transfer" is simply to hand over or part with something, and a shareholder who agrees to sell is parting with something. The context must determine in what sense the word is used. In article 7 it clearly means a deed of transfer. In article 8, which authorises certain dealings "by way of transfer or bequest," it must, I think, refer to the sale or gift of the shares. I have already referred to the obvious purpose of article 9; to give the other shareholders an option to purchase shares which any shareholder desires to part with. To be effective it must come into operation before that shareholder agrees to sell to anyone else, and the last part of the article clearly contemplates this. If the other shareholders do not purchase any or all of the shares the owner "may transfer the shares undisposed of to any "person . . . provided that he shall not take for them less than "the price to be ascertained as aforesaid, without first offering "them" to the other shareholders at the new price. That appears to me to make it clear that the shareholder "desirous "of transferring" shall so inform the secretary before he makes any agreement to sell to anyone, and that he is only entitled to agree to sell to a stranger such shares as the other shareholders fail to purchase under article 9. I find nothing in the article which is inconsistent, or even difficult to reconcile, with this interpretation of it.

Whether the appellants are entitled to the remedy which they seek depends in the first place on whether the respondents are now "desirous of transferring" their shares. They were certainly desirous of doing so when they made their contracts with Mr. Fraser. It is said that, though they desired to transfer to him at £3, they never desired to transfer to the other shareholders under article 9. But the article does not say desirous of transferring in the manner which it provides. It simply says desirous of transferring and, if it is to be effective in ensuring that the other shareholders have an option to purchase, it must apply whenever a shareholder desires to sell to anyone. Then it is said that the respondents' desire to transfer has never been evinced by any overt act on which the appellants can found. But if the respondents' admitted actions were in breach of their obligations, I do not see that it matters whether or in what sense they were "overt." I would not hold a desire to transfer proved by some equivocal words or acts. But here it is impossible that the respondents could have done what they did unless they desired to transfer: there is no suggestion of any other reason why they should have contracted with Mr. Fraser.

Another argument was that article 9 cannot be used as a compulsitor, that it is an avenue open to a shareholder who desires to sell his shares, but that he cannot be compelled to use it. That is true in a sense. No action can be taken against a shareholder who merely says that he wishes to sell or does something which shows that that is his intention. But, when he goes further and does something which is a breach of his obligations under the article, the position appears to me to be quite different. Unless some action can then be taken to assert the other shareholders' rights under the article there is a wrong without a remedy.

The respondents next maintained that, even if they were desirous of transferring their shares when they made these contracts, they are entitled to say that they are no longer desirous of doing so. They do not deny that they have received and intend to keep the price of the shares. But they say that at present neither they nor the purchaser intend transfers to be made. They appear to be waiting to see whether some change will be made in the appellant company which will result in transfers being accepted and registered. But, in my judgment, a person who has agreed to sell with a view to a transfer at some future date cannot be heard to say that he is not desirous of transferring the shares merely because it suits him and the purchaser to delay execution and presentation of the transfers.

One reason for not granting this remedy which appears to have weighed heavily with the learned judges of the Court of Session is that if it is granted the respondents will be unable to avoid a compulsory sale of their shares to other shareholders who are willing to buy them in terms of article 9. If that were so I would find this case much more difficult. It would seem unjust that a shareholder who in bona fide mistakes his rights should be compelled to sell his shares on terms which he cannot control, and

I might find it difficult to read such a meaning into an article of this kind. But I think that that is not the meaning of article 9. That article requires a notice to be given by any shareholder who desires to sell his shares, but it does not make such a notice irrevocable. No doubt it becomes irrevocable when the procedure following on it results in a contract between the shareholder giving the notice and another shareholder who has made an offer for the shares, and I need not discuss the question of the exact stage at which such a contract emerges. But until that stage is reached it appears to me that it is open to the shareholder who gives the notice to withdraw it: I see no reason to doubt two decisions of the Court of Session on this matter, *Smith* v. *Wilson* [1] and *Stevenson* v. *Wilson*.[2]

Both these cases arose out of the same transaction. In 1900 Wilson, as trustee in a sequestration, advertised for sale shares of J. M. Smith Ltd. and on January 20 Stevenson agreed to buy the shares. An article of association of the company, known to both, required a shareholder wishing to sell first to offer his shares to the company at a stated price and contained provisions for their sale to the directors or other shareholders. Wilson duly offered the shares under this article but for some reason which does not appear he withdrew this offer before it was accepted. In the first of these two cases the Second Division held that he was entitled to do so. Stevenson then paid the price and presented transfers in his favour which the company refused to register, but apart from that the company raised no objection to Wilson having agreed to sell to Stevenson. Possibly this was because in the circumstances it did not matter to the company that Stevenson should have a beneficial interest in the shares or that Wilson should vote as Stevenson required him to do. Then there was a deadlock because the company refused to pay dividends to Stevenson and Wilson refused to collect them and hand them to Stevenson, and the second of these actions was raised by Stevenson. The Lord Ordinary held that the shares were held by Wilson in trust for Stevenson and he was required to produce an account of his intromissions. The First Division adhered and Lord Dunedin said [3]: " . . . when there is a stipula-"tion in the articles of the company which allows the directors of "the company to refuse at their own hand any particular trans-"feree, then A and B, who are contracting, do so with their "eyes open, and knowing that it may be the case that B will not

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[1] 1901, 9 S.L.T. 137.
[2] 1907 S.C. 445.
[3] Ibid. 455.

"be accepted as a transferee. It still becomes the duty of B, if "he cannot get the [company] to register him, to find a transferee whom the [company] will register in order to free A, "and I think, if he is entirely unable to do that, A can bring "the bargain to an end. But I think he could only do so in the "ordinary way by annulling the bargain, that is, giving back "the money he had got from B and bringing matters to their "entirety." As Wilson did not desire to annul the bargain or give the money back he must[4] "fulfil this obligation of quasi-"trustee to which the judgment of the Lord Ordinary subjects "him."

From these cases two things follow—first, any notice given by the respondents would not be irrevocable, and secondly, the respondents can if they choose annul their bargains with Mr. Fraser. The cases are of no assistance on the question whether a company is entitled to object and take action if a shareholder purports to sell to a stranger in breach of its articles because J. M. Smith Ltd. did not object and this question was not raised.

Under article 9 the respondents are bound to give notices so long as they are desirous of selling their shares, and they must be held to be desirous of selling their shares so long as they maintain and do not annul their contracts with Mr. Fraser. It is in their power to do that, and, once they have done so, they will be entitled to say that they are no longer desirous of transferring their shares. So any decree requiring them to give notice must be so qualified that they are only required to give notice if they are still desirous of transferring their shares. And, even if they have not terminated these contracts before they are required to give notice, they could still do so and withdraw the notices before any contract with the other shareholders had been made. But if either of the respondents does not withdraw the notice then the shares to which it relates will pass to other shareholders who acquire them under article 9 and the respondents will receive the price payable under that article.

In these circumstances, I see no difficulty in granting a decree of the kind sought. It is a decree requiring specific implement, requiring the respondents to do something which they have undertaken to do and which they are still able to do. It is argued that a court should not order a person to do something which he can immediately undo. As a general proposition that may be true, but here the purpose of the decree is to afford a remedy against a continuing breach of an obligation and the step ordered could only be undone after that breach had ceased.

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[4] 1907 S.C. 445, 456.

In view of the respondents' admissions in their defences no proof is necessary, and their counsel did not maintain that proof should be allowed. In my judgment, the interlocutors appealed from should be recalled and the cases should be remitted to the Court of Session with a direction in each case (1) to repel the first plea in law for the defenders and to sustain the sixth plea in law for the pursuers, (2) to grant decree of declarator that the defenders, being the holders of ordinary shares of Lyle & Scott Ltd. amounting to more than one per centum of the issued ordinary share capital of the said company and having agreed to sell their said shares, have shown themselves to be desirous of transferring their said shares within the meaning of article 9 of the articles of association of the said company and are therefore bound to implement the said article 9 by informing the secretary of the said company in writing of the number of ordinary shares comprised in the said agreement of sale, and (3) to ordain the defenders, standing the said agreement to sell, forthwith to implement the terms of the said article 9 by informing the said secretary in writing of the number of ordinary shares which they have agreed to sell and to proceed as accords.

Lord Tucker. My Lords, by signing the form of acceptance which had been enclosed in the letter of November 6, 1956, from Messrs. Hill, Dougal & Co. on behalf of Mr. Hugh Fraser, the respondents entered into a contract with Mr. Fraser whereby they agreed to sell all their ordinary shares in Lyle & Scott Ltd. and to deliver up their share certificates and sign the relative transfer deeds when called upon to do so in exchange for the price. They thereby bound themselves to take every step which is required from the holder of a share who desires to transfer to another the legal and equitable title to his share. They have received from Mr. Fraser the agreed purchase price and the contract still subsists. By so doing they have, in my view, beyond question taken an overt act signifying their desire to transfer their shares within the meaning of article 9 of the articles of association of Lyle & Scott Ltd. Such desire must be taken as continuing so long as the contract subsists. The desire to sell having been established, it became imperative for the respondents to inform the secretary of the company in writing of the number of shares they desired to transfer and thereby to bring into operation the procedure contained in the article for offering such shares to all the other ordinary shareholders at the price fixed in accordance therewith.

I cannot accept the respondents' contention that the desire to sell envisaged by the article does not include a desire to sell to some specific person but only applies to a desire to sell to some unascertained purchaser who may be found as a result of notification to the secretary and putting into operation the procedure of the article. This step of informing the secretary was not taken and the respondents were and continue to be in breach of the article. For the purpose of ascertaining whether or not there has been a breach it is not, in my opinion, necessary to decide the meaning of the word "transfer" in the first nine lines of the article as printed at page 82 of the appendix to the Record nor to consider whether the steps so far taken by the respondents constitute a transfer.

For these reasons I am in agreement with the decision of the First Division of the Court of Session that the appellants have relevantly alleged in their pleading a breach of article 9.

With regard to the remedies sought for the breach, I agree with your Lordships that, subject to the proposed modification of the language of relief set out in conclusions 1 and 2, the appellants are entitled to the relief claimed therein. The Court of Session, in coming to a contrary conclusion, were, I think, much influenced by their view that the respondents could not be deprived of the locus poenitentiae afforded to them under the article of withdrawing their notification of willingness to sell before acceptance. I agree with your Lordships that relief in the terms proposed by my noble and learned friend, Lord Reid, makes it plain that no such consequence can result. I also agree that the only matters of fact in dispute on the pleadings being whether transfers were executed and whether the share certificates were deposited or handed over for inspection and returned and that the determination of these questions being unnecessary for the decision of these appeals, your Lordships can dispose of them without requiring that the cases should go for proof.

Lord Keith of Avonholm. My Lords, this is my opinion in *Lyle & Scott Ltd.* v. *Scott's Trustees.* This case, I think, can be disposed of on the averments of the parties on record without the necessity of a proof. The case turns upon the meaning and effect of article 9 of the pursuers' articles of association which has already been quoted. It is quite clear from the admissions of the defenders that they have agreed to sell their shares to an unnamed purchaser, and have received payment of the purchase price. The defenders qualify this admission by saying that they have only sold the beneficial interest and have no intention of executing a document of transfer " at the present time." They say they have no intention of invoking article 9. I shall consider the bearing of these qualifications in a moment. The Lord Ordinary has, I consider, accurately stated the position when he says[5]: " The defenders' averments as a whole seem to me to indicate " a sale or transfer of the shares subject to a condition that the " formal steps necessary to complete the transfer should be " postponed for a period which is not stated. If that be a right " reading of the defences, I take leave to suspect that the delay " in completing the transfer was introduced simply in order to " leave open an argument that article 9 did not apply to the " circumstances of these particular transactions."

The defenders in fact relied for their main argument on the submission that article 9 did not apply here at all. Their argument proceeded on a very narrow point. The word " transfer " in the prohibitory words in article 9, " no transfer of ordinary shares " . . . shall take place for an onerous consideration so long as," etc., meant, they said, " no registration of an instrument of " transfer shall take place." From this, as I understood it, the next stage was reached that the words: " Any such ordinary " shareholder who is desirous of transferring his ordinary shares " shall inform the secretary in writing of the number of ordinary " shares which he desires to transfer," etc., must be read as referring to an ordinary shareholder desiring to register an instrument of transfer. As the defenders were not, at the moment at least, so desirous, article 9 could not be invoked. I am unable to accept such a construction of article 9. For one thing, it is not the vendor who has the instrument of transfer registered but the purchaser. But apart from that it is apparent from a cursory perusal of the articles that the word " transfer " is used in varying senses in different places, depending on the context. For instance, in article 2 (*a*), " no transfer which would increase " such number of members beyond fifty shall be valid " clearly must refer to a registered transfer, but the very next words " and the directors shall refuse to recognise or register any transfer which would so increase such number," refers to an unregistered instrument of transfer. So also under article 7 the directors may in their absolute discretion decline to register any transfer of any share. On the other hand, there are provisions which, in my opinion, use "transfer" in the broad sense of "dispose "of," or "sell." Thus article 9 itself concludes by saying that in certain eventualities "the intending transferor may trans-"fer the shares undisposed of to any person." That, of course, will cover all the steps necessary to effectuate the title of the purchaser. But it must start with an agreement to sell for a price. It is not the intending transferor who completes the transaction but the purchaser, and the document of transfer requires the signatures of both purchaser and seller. So also in article 12, which provides that an employee shareholder who ceases to be employed by the company, or by a subsidiary company, shall "transfer his ordinary shares to the nominees of the "directors," "transfer" is used, in my opinion, in a broad sense as meaning "dispose of" his shares to the directors' nominees.

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[5] 1958 S.C. 230, 233–234.

Even if the words "no transfer of ordinary shares . . . shall "take place" were to be read as meaning "no transfer of "ordinary shares shall be registered," it does not therefore follow, in my opinion, that under the article a shareholder does not express his desire to transfer his ordinary shares until an instrument of transfer of the shares has been presented for registration. If I may express my view of the article in the most general sense, I think the prohibitory part of the article is the sanction which prevents a shareholder from carrying through a transfer of shares without complying with the machinery of transfer set out in the second part of the article. And I think a shareholder who has transferred, or pretended to transfer, the beneficial interest in a share to a purchaser for value is merely endeavouring by a subterfuge to escape from the peremptory provisions of the article. A share is of no value to anyone without the benefits it confers. A sale of a share is a sale of the beneficial rights that it confers, and to sell or purport to sell the beneficial rights without the title to the share is, in my opinion, a plain breach of the provisions of article 9. This, I think, is the view which commended itself to Lord Sorn, and I think he is right. What has happened in the present case is that by virtue of the articles the purchaser is unable to take the seller's name off the register and substitute his own. The defenders have done everything apart from executing a formal instrument of transfer that would be necessary to a normal purchase and sale of shares. They have even done more, for they have executed proxies in favour of the purchaser's solicitors. While leaving it open whether there has been any breach of the prohibitory part of article 9, which may be directed rather to the company and its board than to the shareholders, I am clear that there is here a clear breach of the positive part of the article requiring an intending transferor to inform the secretary in writing of the number of shares he wishes to transfer and an invasion of the rights of the shareholders under the article. The admitted actings of the defenders, in my opinion, lead to the inevitable inference that they are desirous of transferring their ordinary shares. The qualifications that the defenders seek to attach to their admissions, videlicet, that they have no intention of invoking article 9, and that neither the purchaser nor the defenders intend that a document of transfer shall be executed or delivered "at the present time," do not, in my opinion, affect the matter one bit. Standing a completed and unrepudiated contract of sale and acceptance of the purchase-money, the defenders cannot be heard to say that they are not desirous to transfer their shares because they choose for some reason or other to hold up completion of the document of transfer or wish to sell only to a particular person.

The Lord Ordinary and their Lordships of the First Division have taken the view that it is not open to compel the defenders to initiate the procedure laid down in the article by giving notice to the secretary of their desire to sell their shares. They seem to have proceeded on the view that it is for the defenders, and the defenders alone, to say whether they will set the machinery of the article in motion by intimating their desire to the secretary. The Lord President would seem to look for some overt act of such desire, such an act as notice to the secretary. The decision in *Smith* v. *Wilson* [6] was also thought by their Lordships to be adverse to imposing any compulsitor on the defenders.

In my opinion, the admitted actings of the defenders are overt acts amply sufficient for any court of law to infer a desire on their part to sell their shares. There must reside in the courts some power to enforce observance of the article, unless the rights of the shareholders are to be defeated, and the appropriate step at this stage, in my opinion, is to ordain the defenders to give notice to the secretary of their desire to transfer the number of shares which they have contracted to sell to their purchaser. There is nothing in the decision in *Smith* v. *Wilson* [6] to prevent such a course. In that case Wilson offered, under a clause similar to that in the present case, certain shares to the company concerned. The offer was made on January 31, 1900. The offer was intimated by the board to the other shareholders, and on February 10 a shareholder lodged with the company a sealed offer to buy the shares. Before this the intending seller had withdrawn his offer on February 5. The only point considered was whether Wilson was bound to keep his offer open for fourteen days from the board's notice to the other shareholders, within which a shareholder could lodge his offer to buy. The court held that Wilson was not bound to keep his offer open for that period. It appears from the later case of *Stevenson* v. *Wilson*[7] that Wilson had, on January 30, 1900, entered into a conditional contract with Stevenson, which incorporated the company's articles of association, for sale of the shares which he offered to the company on January 31. But no point was taken on this in *Smith* v. *Wilson*.[8] In *Stevenson* v. *Wilson*,[9] Wilson being still on the register, the Lord Ordinary (Lord Salvesen) granted a declarator (1) that Stevenson had the beneficial right in the shares and (2) that Wilson held them in trust for him so long as Wilson remained on the register and the pursuer (Stevenson) held the beneficial interest. The company was cited as a defender in this litigation but no decree was made against it and the Lord Ordinary held that the declarators granted were not binding on the company and that the company was not bound under its articles to recognise the pursuer's (Stevenson's) beneficial interest. Wilson reclaimed to the First Division, which adhered to the Lord Ordinary's interlocutor. The Lord President (Lord Dunedin) pointed out that a seller of shares was ordinarily entitled to get his name off the register but that under their contract both seller and buyer knew this might be impossible. It still remained, however, the duty of the buyer to find a transferee whom the company would register, and if he could not do so, the seller might bring the contract to an end. In neither of these cases was any of the questions that have been debated in this case considered. Nor could they have been, unless they were raised by the persons competent to do so, the company or the shareholders. I see no reason why in a situation like the present the company cannot bring matters to a head and cut the Gordian knot, as well as protect the rights of their shareholders, by obtaining a decree from the court that will compel the vendor to initiate procedure under the articles.

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[6] 1901, 9 S.L.T. 137.

[7] 1907 S.C. 445.

[8] 1901, 9 S.L.T. 137.

[9] 1907 S.C. 445

H. L. (Sc.)
1959

Lyle & Scott Ltd. v. Scott's Trustees. Same v. British Investment Trust Ltd.

Lord Keith of Avonholm.

In re Copal Varnish Co. Ltd.[10] was much relied on by the defenders. I find nothing in it that directly touches the issue here. But there are dicta of Eve J. which appear to me to tell against the defenders. It hardly needs authority that a step in an onerous transfer of shares is a contract of sale, but Eve J. went out of his way to emphasise that fact, and I see little reason to think that he would have said that a contract to sell shares did not evidence a desire to sell the shares. I quote only one passage from his judgment which is much in point here[11]: "So long as prior to the completion of the transaction "an opportunity is given to the directors sitting as a board to "determine whether the proposed transferee is a person whom "they are prepared to admit as a member of the company, the "conditions imposed by the article are, in my opinion, complied "with, and the contract into which the vendor on becoming a "shareholder entered with his co-shareholders is sufficiently "discharged." That case was concerned with the consent of directors under a company's articles to a transfer of shares. But mutatis mutandis it can equally be applied to the contract which the defenders made here with their co-shareholders when they became members of the company and bound themselves to observe the conditions of article 9.

In the circumstances, I think the pursuers' averments and the admissions of the defenders are relevant to infer a desire of the defenders to transfer their ordinary shares for an onerous consideration within the meaning of article 9. In my opinion, the defenders' first plea in law should be repelled, the pursuers' sixth plea in law should be sustained, and an appropriate decree within the conclusions of the summons should be pronounced. I agree with the form of order proposed by my noble and learned friend, Lord Reid.

I would accordingly allow the appeal.

My Lords, in the case of *Lyle & Scott Ltd.* v. *British Investment Trust Ltd.* I can see no material distinction between this case and the case of *Scott's Trustees* in which judgment has just been given. The same result must follow and a similar order be made. I would allow the appeal.

Lord Somervell of Harrow. My Lords, I agree.

[The House ordered: "That the said interlocutors of October

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[10] [1917] 2 Ch. 349.

[11] Ibid. 355.

"30, 1957, and of February 14, 1958, . . . be, and the same are, "hereby recalled. And it is further ordered that the case be "and the same is hereby remitted back to the Court of Session "in Scotland with a direction (1) to repel the first plea-in-law "for the defenders and to sustain the sixth plea-in-law for the "pursuers; (2) to grant decree of declarator that the defenders, "being the holders of ordinary shares in Lyle & Scott Ltd. "amounting to more than one per centum of the issued ordinary "share capital of the said company and having agreed to sell "the said shares, have shown themselves to be desirous of transferring their said shares within the meaning of article 9 of the "articles of association of the said company and are therefore "bound to implement the said article 9 by informing the secretary of the said company of the number of ordinary shares "comprised in the said agreement of sale; and (3) to ordain the "defenders, standing the said agreement to sell, forthwith to "implement the terms of the said article 9 by informing the said "secretary in writing of the number of ordinary shares which "they have agreed to sell."]

Appeal allowed.

Solicitors: *Slaughter & May for Davidson & Syme W.S., Edinburgh; Herbert Smith & Co. for Macpherson & Mackay W.S., Edinburgh; Martin & Co. for Dundas & Wilson W.S., Edinburgh.*

F. C.

J. C.*
1959
June 1.

BARON UNO CARL SAMUEL AKERHIELM AND ANOTHER . . . . APPELLANTS;

AND

ROLF DE MARE AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Company — Shares — Issue — Misrepresentation — Statements in circular letter—Honest belief in untrue representations—Capital "subscribed"—Allotment of fully-paid shares in respect of formation expenses and acquisition of patent rights—"Subscribed"—Whether payment in cash essential.

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* *Present*: LORD KEITH OF AVONHOLM, LORD JENKINS and the RT. HON. L. M. D. DE SILVA.

Fraud—Honest belief in truth of statement—Sense in which it is understood by person making it—Construction by court—Test of honest belief.

Court of Appeal—Fact, question of—Appeal from lower court—Fraud—Acquittal by Supreme Court of Kenya—To be displaced on appeal only on clearest grounds.

Eastern Africa—Company—Shares—Sale—Alleged fraudulent misrepresentation.

In a circular letter signed by the appellants which, the respondents alleged, induced them to subscribe for shares in a private company formed in Kenya for the purpose of manufacturing "cold "process" tiles, it was stated, inter alia, "(*b*) We have procured "the patent rights for most countries in Africa, India and "Pakistan," and "(*c*) About one-third of the capital has already "been subscribed in Denmark." The company having gone into liquidation and the whole of the shareholders' money been lost, the respondents brought this action against the appellants alleging that representations (*b*) and (*c*) were fraudulent misrepresentations and claiming damages. The trial judge held that both representations were untrue, but that the appellants honestly believed them to be true at the time when they were made, and, applying *Derry* v. *Peek* (infra), dismissed the action.

On appeal, the Court of Appeal for Eastern Africa hesitated to hold that representation (*b*) was false, and declined to hold that it was made fraudulently; they found that representation (*c*) was untrue, but reversed the trial judge's finding that the appellants honestly believed it to be true, and awarded damages:—

Held, (1) that, assuming, without deciding, that representation (*b*) was not wholly true, there was no sufficient reason for disturbing the concurrent findings of the courts below in favour of the appellants on that point.

(2) The word "subscribed" in the circular letter did not mean that one-third of the capital had already been subscribed in cash; consistently with the representation, formation expenses of the company and the acquisition of patent rights could be met by allotting fully-paid shares.

(3) That, in the circumstances, the Court of Appeal were not justified in reversing the trial judge's view, formed after seeing and hearing the first appellant give evidence, that he did honestly believe representation (*c*) to be true.

Benmax v. *Austin Motor Co. Ltd.* [1955] A.C. 370; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326 considered.

(4) Even assuming that the Court of Appeal were justified in substituting their own conclusion for that of the trial judge on the question of honest belief, they had adopted a wrong method of approach in that they construed the language of representation (*c*) as they thought it should be construed according to the ordinary meaning of the words, and held that, on the facts known to the appellants, it was impossible that either of them could ever have believed the representation as so construed to be true. The question was not whether the defendant in any given case honestly believed

the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it, albeit erroneously, when it was made.

Derry v. *Peek* (1889) 14 App.Cas. 337; 5 T.L.R. 625; *Angus* v. *Clifford* [1891] 2 Ch. 449; 7 T.L.R. 447, and *Lees* v. *Tod* (1882) 9 Rettie 807, 854 applied.

Arnison v. *Smith* (1889) 41 Ch.D. 348; 5 T.L.R. 413, so far as inconsistent with the above authorities, disapproved.

(5) Where a defendant has been acquitted of fraud in a court of first instance the decision should not be displaced on appeal except on the clearest grounds.

Principle in *Glasier* v. *Rolls* (1889) 42 Ch.D. 436 at 437; 5 T.L.R. 691 applied.

Judgment of the Court of Appeal for Eastern Africa reversed.

APPEAL (No. 8 of 1957) from a judgment of the Court of Appeal for Eastern Africa (July 4, 1956) reversing a judgment of the Supreme Court of Kenya (May 18, 1955).

The following facts are taken from the judgment of the Judicial Committee: In this case the present respondents (hereinafter called the plaintiffs) brought an action in the Supreme Court of Kenya against the present appellants (hereinafter called the defendants) and one Eric Von Huth (who died after action brought) claiming damages in respect of certain alleged false and fraudulent misrepresentations contained in a circular letter dated February 24, 1948, and signed by the defendants and Von Huth, whereby the plaintiffs alleged themselves to have been induced to subscribe for shares in Dantile Ltd. (a company incorporated in Kenya on March 20, 1948) and by so subscribing to have suffered damage.

The plaintiff Rolf de Mare subscribed in cash for 500 ordinary shares of the company of 20s. each. The plaintiff Guy Magnus Alexander Faugust subscribed for 1,500 ordinary shares and 250 preference shares of 20s. each, and made over 500 of his ordinary shares by way of gift to his wife, the plaintiff Barbro Wilhelmina Elisabeth Faugust, who did not herself subscribe for any shares.

The company was formed with a view to the manufacture and sale in Kenya and elsewhere of tiles for use in bathrooms, etc., of a type known as "cold process tiles" as distinct from the conventional baked or heat-treated type of tile. There appeared to be no doubt that at the date of the circular letter "cold "process" tiles were being successfully made and marketed in Denmark by way of substitute for the conventional type of tile, which since the war had been difficult or impossible to obtain, and that a method of making "cold process tiles" was the subject of protection under a patent application in Denmark, the benefit of which was vested in a Danish company called Muritas A/S.

Unfortunately the company was not a success, its failure being mainly attributable to the reappearance on the market within a short time after its formation of adequate quantities of the conventional type of tile, and the consequent cessation of the demand which had previously existed for "cold process" tiles, which were in truth no more than a war-time or post-war substitute for the normal article. In August 1950 a Mr. Erik Seex (who gave evidence at the trial) was appointed as an Inspector to investigate the affairs of the company under the Kenya Companies Ordinance. His report led to the prosecution of the defendants and Von Huth for certain offences (not involving dishonesty) under the Ordinance. Later the company went into liquidation and it was found that the whole of the shareholders' money had been lost. In such circumstances it was natural that persons in the plaintiffs' position should look back with a somewhat jealous eye at any statements in regard to the company's position and prospects made to them at the time when they subscribed for its shares.

The statements in the circular letter alleged by the plaintiffs in their plaint to constitute the false and fraudulent misrepresentations on which they relied were three in number, viz.: (*a*) "The tile has been produced and sold successfully in Denmark"; (*b*) "We have procured the patent rights for most countries in Africa, India and Pakistan"; and (*c*) "About one-third of the capital has already been subscribed in Denmark."

At the trial before Corrie J. representation (*a*) was admitted to be true. There thus remained to be dealt with by the judge representation (*b*) as to the patent rights, and representation (*c*) as to "about one-third of the capital" having "already been subscribed in Denmark." The judge held that those representations were both untrue but that the defendants honestly believed them both to be true at the time when they were made. Accordingly, directing himself correctly as to the law applicable to those findings by reference to the principles stated in *Derry* v. *Peek*,[1] he held that the plaintiffs had failed to make good their charges of fraudulent misrepresentation and by his judgment dated May 18, 1955, dismissed the action.

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[1] (1889) 14 App.Cas. 337; 5 T.L.R. 625.

From that judgment the plaintiffs appealed to the Court of Appeal for Eastern Africa. In a judgment delivered by Briggs J.A., and concurred in by Sinclair V.P. and Bacon J.A. that court as to representation (*b*) hesitated to hold that it was false and declined to hold that it was made fraudulently; and as to representation (*c*) concurred with Corrie J.'s finding that it was untrue, but reversed his finding to the effect that the defendants honestly believed it to be true. Accordingly, by the judgment of the Court of Appeal dated July 4, 1956, the appeal was allowed, and judgment was directed to be entered for the plaintiffs for damages assessed at the full amounts paid up on the shares subscribed for by them, on the footing that at the date of their allotment such shares were valueless.

The defendants now appealed from that judgment.

1959. April 7, 8, 9, 13, 14, 15. *H. A. P. Fisher* for the appellants. Representations (*b*) and (*c*) were honestly made; that is enough for the appellants' purpose; the Court of Appeal were wrong. If the Board find that on the natural and ordinary meaning of the words the representations are true, then the appellants' case is that much stronger. Reliance is placed on *Armstrong* v. *Strain*.[2] Here it is common law deceit or nothing. The argument falls under three main heads. First, as to the patent rights —representation (*b*)—there are concurrent findings that that representation was not fraudulent, and no ground was alleged which would justify the Board in departing from the Board's rule of practice that they will not interfere, except on certain specified grounds, where there have been concurrent findings of fact by two lower courts: *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy*[3]—propositions (4), (5) and (6) in the judgment in that case are perhaps the relevant ones. Nothing is alleged by the respondents which brings this case within any of those exceptions. It is not now open to the respondents to take the case out of the general rule of practice by alleging any error in admissibility of evidence. It is submitted that the first head on the distinction made in *Benmax* v. *Austin Motor Co. Ltd.*[4] between primary facts and inferences does not really come in. On the evidence the representation was not fraudulently made, and the courts below were correct in so holding.

[2] [1951] 1 T.L.R. 856, 871; affd. [1952] 1 K.B. 232; [1952] 1 T.L.R. 82; [1952] 1 All E.R. 139.

[3] [1946] A.C. 508, 521; 62 T.L.R. 549.

[4] [1955] A.C. 370; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326.

Secondly, with regard to the subscription in Denmark—representation (*c*)—prima facie this is a case where the appellate court should not have interfered with the finding of the trial judge that the appellants honestly believed it to be true. The ground on which the Court of Appeal departed from that is not justifiable, for (a) there was uncontradicted and unchallenged evidence that Hollister (who became solicitor to the company when it was formed) was consulted and approved the form of the circular letter. (b) It was never part of the appellants' case that Hollister was responsible for the statement that about one-third of the capital had already been subscribed in Denmark. Consequently, Hollister's evidence, if he had been called, could neither have corroborated nor contradicted the evidence of the first appellant, Baron Akerhielm, as to his honest belief in the truth of that statement. (c) Consequently upon (a) and (b), on the facts of this case no adverse inference ought to be drawn from the fact that Hollister was not called. (d) As a matter of principle, a finding of fraud ought not to be based on any presumption: *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[5]; *Ng* v. *The Queen.*[6] As a matter of principle it is not justifiable to base a finding of deceit in the circumstances of this case on an inference. (e) No inference of the kind which the Court of Appeal have drawn should be drawn unless the point is taken at the trial, so that the witness could be called or his absence justified. There is authority for that. (f) The Court of Appeal said that the judge misdirected himself when he said that the plaintiffs in the action could have called Hollister. It is submitted that the supposed misdirection by the judge in saying that the respondents could have called Hollister related solely to the representation about the patent rights. (g) The trial judge did not in fact misdirect himself at all. (h) Where there is an allegation of fraud against a defendant the communications between himself and his solicitor as to the subject-matter of the alleged fraud are not privileged.

All the above matters with regard to representation (*c*) really go to the *Benmax* point,[7] namely, whether this is a case in which an appellate court would be justified in interfering with the finding of the judge that the representation was honestly made. The earlier cases on this topic are conveniently set out in the *Benmax* case.[7] There are three questions to be answered on the *Benmax*

[5] [1942] A.C. 154, 192; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[6] [1958] A.C. 173, 181–182; [1958] 2 W.L.R. 599.

[7] [1955] A.C. 370.

point. The first is: Is the nature of the question—was the appellant honest when he made representation (*c*)?—one of primary fact or of inference from primary fact? It is submitted that it is the former; it is a question of the state of a man's mind. This is a case where credibility of witnesses comes into question, and consequently it falls into the first category rather than the second. The second question is: Is the manner in which the judge of first instance decided this question such as to bring the rule—that the appeal court will not interfere—into operation? The test to be applied in answering that question is, did his estimate of the witnesses form a substantial part of his reasons? Those words are taken from the speech of Lord Sumner in *The Hontestroom.*[8] The third question is: Is there anything in this case to take it outside the general rule? Admittedly there are exceptional cases, but there are always two matters to be determined in considering whether even in such a case an appellate court should interfere: (i) is this one of the exceptional cases where the appellate court will interfere if it has materials on which to do so? and then one has to go on and ask, (ii) has the appellate court got the materials on which to form its own opinion? For that point reliance is placed on what Lord Thankerton said in *Watt* (*or Thomas*) v. *Thomas.*[9] To decide the first of those questions—whether this is one of the exceptional cases—the Board will have to go into the pros and cons of the Hollister question, and see whether, on the view they take, it makes this case such an exceptional one as to fall within the class of cases which, on the authorities, justify an appellate court in interfering. The Board will also have to consider whether in this case in any event the appellate court is in a position to make its own finding when it lacks an essential part of the material—Hollister's evidence.

For the authorities on this point, see *per* Viscount Simonds in the *Benmax* case,[10] where he cites Professor Goodhart's article in the Law Quarterly Review, vol. 71, pp. 405–411; *The Hontestroom* [11]; *Powell* v. *Streatham Manor Nursing Home* [12]; *Watt* (*or Thomas*) v. *Thomas*,[13] where Lord Thankerton stated the position correctly, and the Board is asked to follow that; *Glasier* v. *Rolls*,[14] a case which is also relied on.

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[8] [1927] A.C. 37, 47; 42 T.L.R. 741.

[9] [1947] A.C. 484, 488; 63 T.L.R. 314; [1947] 1 All E.R. 582.

[10] [1955] A.C. 370, 374.

[11] [1927] A.C. 37, 47, 50.

[12] [1935] A.C. 243, 247, 249, 255, 265; 51 T.L.R. 289.

[13] [1947] A.C. 484.

[14] (1889) 42 Ch.D. 436; 5 T.L.R. 691.

Coming now to the ground which the Court of Appeal thought sufficient to justify them in interfering with the decision of the trial judge—that " the . . . judge appears to . . . have assumed " that the appellants [plaintiffs] could have called Mr. Hollister, " if they wished, to show that he was not responsible for the " substance of the documents. I think, with respect, that this " was a serious misdirection which goes to the root of the judge's " finding that the respondents [defendants] acted innocently " —if there was a misdirection, it does not bear on the question of the honesty of the representation about subscription of capital, but related solely to the patent rights position. If the Court of Appeal is wrong, then this case is similar to *Powell* v. *Streatham Manor Nursing Home*,[15] and no grounds have been shown for the Court of Appeal to interfere. And further, the Court of Appeal were wrong in saying that " an inference unfavourable to the " respondents [defendants] could and should have been drawn " from their failure to call him [Hollister]." In any case a presumption of that kind should not be used as a foundation for a finding of fraud. *Ng* v. *The Queen* [16] is a different case, but it contains a dictum which is relied on. One starts with a presumption of innocence, and there must be something affirmative to displace it: *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[17] Further, any inference of the kind drawn by the Court of Appeal is not legitimate unless at the trial the point has been taken and an opportunity given for the witness to be called: *Banwari Lal* v. *Mahesh*.[18] Hollister might have been called and given an explanation. There is a rule that where there is an allegation of fraud against a defendant, communications between him and his solicitor as to the subject-matter of the alleged fraud are not privileged.

On this *Benmax* part of the case the Court of Appeal should not have interfered with the decision of the trial judge, and their grounds for so doing were not sound.

If the Board are against the appellants so far, and the Court of Appeal were free to consider the matter at large, the third main head of argument is that on the evidence the Court of Appeal should have held that the representation as to subscription in Denmark was not fraudulent, and this Board ought to investigate afresh the question whether or not the appellants were fraudulent. It is legitimate for shares to be issued, as the context

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[15] [1935] A.C. 243.
[16] [1958] A.C. 173.
[17] [1942] A.C. 154, 192.
[18] (1918) L.R. 45 I.A. 284.

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showed they were to be in this case, for consideration other than cash. [Reference was made to *Angus* v. *Clifford*[19] and *Armstrong* v. *Strain*.[20]] There are four sub-heads on this aspect of the case: (i) The circular letter must be read as a whole. (ii) It is plain that the word "subscribed" is not used in the sense of subscribed in cash. (iii) The first appellant gave evidence as to the sense in which the words were used, and if that evidence is true the representation, on the principles laid down in the cases, was not fraudulent. (iv) The evidence of the first appellant on this point was unchallenged in cross-examination; no cross-examination was addressed to him as to the honesty of his belief or as to the sense in which he understood the phrase.

The position of the second defendant is, of course, different, because he did not give evidence. The court had, however, the benefit of a long report from him about the circumstances of the case. He is, it is submitted, entitled to the benefit of the evidence of the first appellant. It would be paradoxical if the Board held that Baron Akerhielm was honest and that Beyer was not. There are no circumstances on which the Board can so hold—the facts are common to the two cases. The onus of proof remains on the plaintiffs throughout: *Glasier* v. *Rolls*[21]; the plaintiffs fail if the matter is left in doubt. To prove that the defendants were fraudulent is something more than proving that the statement was false. The passage in Kerr on Fraud and Mistake, 7th ed., p. 675, dealing with the shifting of the burden of proof is, it is submitted, misleading, and does not apply to common law actions. That passage is supported by a number of cases, but none is a common law action for deceit, they are all equity cases where a person was claiming to set aside a transaction on the ground of fraud. The true position is stated on p. 669 of Kerr—that the burden rests throughout on the plaintiff. *Hornal* v. *Neuberger Products Ltd.*[22] shows that a high degree of proof is required in a case where fraud is alleged.

There is no evidence that the first and second plaintiffs purchased their shares in reliance on the representation as to subscription in Denmark or, indeed, on the representation as to patent rights. The plaintiffs have to show that they were substantially induced by the representation in question: *per* Lord Halsbury L.C. in *Derry* v. *Peek*.[23] The third respondent said in evidence that she relied on these particular representations. They were not, however, addressed to her, and so were not made in order to induce her to take shares; she, therefore, had no cause of action. She also has no cause of action for the further reason that the shares were paid for by her husband and given to her by him as a gift.

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[19] [1891] 2 Ch. 449; 7 T.L.R. 447.

[20] [1951] 1 T.L.R. 856.

[21] 42 Ch.D. 436, 458.

[22] [1957] 1 Q.B. 247, 262, 266–267; [1956] 3 W.L.R. 1034; [1956] 3 All E.R. 970.

[23] 14 App.Cas. 337, 344.

With regard to damages, on the evidence the shares had some value at the date when the first and second respondents subscribed, and the fact that they became worthless by 1950 was due to subsequent events. In *Twycross* v. *Grant* [24] the shares were valueless from the start, and that case is distinguishable. The Court of Appeal here ought not to have held that the damages, if any, were the full value of the shares. They should, therefore, be for something less than the full amount subscribed. The third respondent not having herself subscribed for any shares, suffered no damage.

Roger Willis for the respondents. First, if the respondents fail on what was called the *Benmax* point—the question whether the Court of Appeal were right in interfering with the findings of the trial judge—the appeal will succeed. This is not a case where there is a divergence of evidence given on behalf of the plaintiffs and the defendants in the courts below, so that the judge had to make up his mind whether or not he accepted the evidence of one or the other. The basic facts are not in dispute. For the purpose of drawing the correct inference from those facts the Court of Appeal were in as good a position as was the trial judge, except for the advantage of seeing the first defendant in the witness-box. This case is different from the *Powell* case,[25] where the Court of Appeal had interfered with the finding of the trial judge where there was a dispute of evidence between the plaintiff and the defendant. *Watt* (*or Thomas*) v. *Thomas* [26] is distinguishable, because here there is no dispute with regard to the basic facts; it is a question of the correct inference to be drawn. There is here no conflict of evidence: *Powell's* case.[27] The law on this matter is correctly stated in *Mersey Docks and Harbour Board* v. *Procter*,[28] and is relied on. The present case, it is conceded, must be brought within the third rule stated by Lord Thankerton in *Watt* (*or Thomas*) v. *Thomas*.[29] In any event, Lord Thankerton is saying that even where it is a question of credibility of witnesses the appellate court may nevertheless draw an inference; the trial judge is not treated as infallible simply because he has seen the witnesses. There are some passages in *Yuill* v. *Yuill* [30] which are helpful in the present case. When one comes to look at the judgment of the trial judge here, in which he found that the first appellant was honest in making the representations which he did, the judge has not in fact checked, as it were, that finding by a critical examination of the whole of the evidence. If he had, the result might well have been different. It is submitted that he went wrong in acquitting the first appellant of fraud and that the Court of Appeal were right.

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[24] (1877) 2 C.P.D. 469, 489, 543.

[25] [1935] A.C. 243.

[26] [1947] A.C. 484.

[27] [1935] A.C. 243, 247, 249.

[28] [1923] A.C. 253, 258; 39 T.L.R. 275.

[29] [1947] A.C. 484, 488.

With regard to the representations concerning the patent rights and the subscription in Denmark, in the case of the patent rights there is in the forefront the point made for the appellants that there is in their favour a concurrent finding by the two courts below, and that in the printed case for the respondents there is no ground alleged which would justify the Board in departing from the rule of practice. There is, in fact, no concurrent finding as to whether or not the representation was true or false. The trial judge found it was false, the Court of Appeal did not decide it because, in any event, they thought it was honestly made. Propositions (4) and (6) in *Srimati Bibhabati Devi's* case [31] are the only ones from which the respondents can draw any real comfort or assistance. On the evidence the only proper result was a finding of dishonesty, and there was no evidence the other way. As to proposition (6), this, it is conceded, is a somewhat unusual case, but looking at the documentary and oral evidence the proper inference is that the representation with regard to the patent rights was made fraudulently. It is established, principally on the documents, that this representation was untrue, and the appellants must have known that it was. Both courts below were wrong in acquitting the appellants of fraud in this matter.

With regard to the representation that one-third of the capital was subscribed in Denmark, the respondents have the advantage of a concurrent finding of fact of the two lower courts on falsehood—that the representation was untrue. Both courts were wrong in so far as they declined to hold that " subscribed " meant subscribed in cash. In the circular letter the word meant subscribed in cash and nothing else. See *Arnison* v. *Smith*,[32] where it was said that "subscribed" could only have one meaning, and *per* Wynn-Parry J. in *Governments Stock and Other Securities Investment Co. Ltd.* v. *Christopher*[33] that "subscribed" meant subscribed for cash—but that was in reference to the Companies Act. If "subscribed" in the circular letter did mean subscribed for cash it was obviously untrue.

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[30] [1945] P. 15, 19–20; 61 T.L.R. 176; [1945] 1 All E.R. 183.

[31] [1946] A.C. 508, 521.

[32] (1899) 41 Ch.D. 348, 357; 5 T.L.R. 413.

Next, the Court of Appeal were right in interfering with the trial judge's finding that the representation as to subscription was made honestly, and were right in holding that that statement was made fraudulently. That court were right when they said that Hollister ought to have been called; the defendants ought to have called him; it was never for the plaintiffs to do so. *O'Rourke* v. *Darbishire*[34] shows that for privilege to be destroyed there must be prima facie evidence of fraud in addition to an allegation of fraud in the pleadings. In *Derry* v. *Peek*[35] Lord Bramwell is saying that if it is proved that a statement is made, and then it is proved that it is untrue, that is prima facie evidence of fraud. The fact that a defendant says that he honestly believed what he said was true is not enough, for a critical examination of all the circumstances may show that the representation was fraudulent, and here the Court of Appeal were right in holding that it was fraudulently made. Each case must depend on its own facts. The larger the amount subscribed is made, the more confidence one gives to the public: *Arnison* v. *Smith*.[36]

Different considerations apply to the second appellant—he did not go into the witness-box; there was a prima facie case against him. It is a complete misconception that the onus of proof was on the plaintiffs throughout. All that the plaintiffs had to do was to make out a prima facie case—a case which required explanation by the defendants: *Lek* v. *Mathews*,[37] which makes it entirely clear that in a civil case the burden of proof does not remain throughout on the plaintiff; it shifts, as Viscount Sumner said in the last cited case, and that passage is referred to in *Hornal* v. *Neuberger Products Ltd.*[38] The plaintiffs proved the case sufficiently to entitle them to judgment.

Every man must be taken to intend the consequences of his own act, and looking at this case as a whole it does not follow that the plaintiffs were not induced by the representation to take shares: *Arnison* v. *Smith*.[39] It is quite clear that they were induced, probably by this representation, certainly by the documents as a whole, and that is sufficient to enable the plaintiffs to recover.

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[33] [1956] 1 W.L.R. 237, 242; [1956] 1 All E.R. 490.

[34] [1920] A.C. 581.

[35] 14 App.Cas. 337, 346, 350.

[36] 41 Ch.D. 348, 357.

[37] (1927) 29 Ll.L.Rep. 141, 164.

[38] [1957] 1 Q.B. 247, 258.

[39] 41 Ch.D. 348, 369.

The position with regard to the wife (the third respondent) was that at the time when the shares were allotted she went straight on to the register, and as a subscriber. There is a contractual relationship between her and the company; and the representation was made to her which induced her to enter into the contract and she can recover damages.

The date of allotment is the correct date for assessing the damages: *Broome* v. *Speak*.[40] If the shares of the wife were a gift by the husband, then he is entitled to the whole of the damages. The Court of Appeal were right on damages.

Fisher in reply. With regard to the representation as to patent rights, there is no ground for taking this out of the established rule relating to concurrent findings. As to the representation about subscription, this is a case where an appellate court should be slow to interfere because it has not the material, or it lacks an essential part of the material, namely, the demeanour of the witnesses: *Watt* (*or Thomas*) v. *Thomas*.[41] *Yuill* v. *Yuill*[42] does not lay down any different test. The material point is, did Baron Akerhielm make the representation honestly? [Reference was made to *Powell's* case.[43]] There is nothing in the *Mersey Docks* case[44] inconsistent with this argument. The first appellant is entitled to succeed on this appeal on the *Benmax* point—that the Court of Appeal should not have interfered with the decision of the trial judge. If the Board are against the appellants on that, then on the evidence the Board ought to find that fraud was not established. [Reference was made to *Angus* v. *Clifford*,[45] *Derry* v. *Peek*[46] and Buckley on Companies, 13th ed., pp. 284, 285.]

A person cannot be convicted of fraud merely because he uses language carelessly: Kerr on Fraud and Mistake, p. 490. *Derry* v. *Peek*[46] fortifies the proposition that the test is a subjective one, and justifies the submission that the test is not, would a reasonable man take the statement to be true, but did this particular man, stupid as he may have been, believe in the statement he made?

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[40] [1903] 1 Ch. 586; 19 T.L.R. 187; affd. sub nom. *Shepheard* v. *Broome* [1904] A.C. 342; 20 T.L.R. 540.

[41] [1947] A.C. 484.

[42] [1945] P. 15, 19.

[43] [1935] A.C. 243.

[44] [1923] A.C. 253.

[45] [1891] 2 Ch. 449; 7 T.L.R. 447.

[46] 14 App.Cas. 337, 348, 350, 368, 377.

In *Arnison* v. *Smith*,[47] on which the respondents relied, the words were construed in the context and in the surrounding circumstances, and it was held that the word " subscribed " was used in the sense of subscribed for cash. In the present case, however, it is abundantly clear from the context that it does not mean that. The courts below are with the appellants on this. Subscribed for cash means to accept an offer from the company for an allotment of shares. Where the situation is that no company exists, capital subscribed cannot be used in that sense. Further, the advantage to the company is the same whether the shares are consideration for services or are paid for in money: *In re Wragg Ltd.*[48]: *In re China Steamship and Labuan Coal Co.*[49] It is of no materiality to prospective subscribers to the company whether the phrase means money out of which the promoters had met the expenses, or whether it means those expenses have been incurred and shares will be allotted to the persons who have provided the services.

Finally, this case must be determined on the evidence. There is no evidence that either of the plaintiffs relied on the representation about capital subscription in Denmark at all. So far as the second appellant is concerned, the burden of proof remains on the plaintiffs throughout: *Derry* v. *Peek*.[50] There is no evidence against Beyer except that the representation was false. So far as the standard of proof is concerned, reliance is placed on *Angus* v. *Clifford*.[51] Beyer is entitled to rely on the evidence of Baron Akerhielm; it is impossible to hold that one was honest and the other dishonest—both had the same knowledge and the same interest, and if the Board find fraud not proved against Baron Akerhielm, it should not be found against Beyer.

June 1. The judgment of their Lordships was delivered by LORD JENKINS, who stated the facts set out above and continued:

The appeal has been fully and elaborately argued, but the essential issues fall within a relatively small compass, and may be thus summarised:

The first question is whether the Court of Appeal were warranted in reopening Corrie J.'s finding to the effect that the defendants honestly believed representation (*c*) to be true; and, if so, whether the Court of Appeal, treating the matter as at large, were justified in concluding as they did that the defendants did not honestly so believe. A distinction is here to be observed between the first defendant, Baron Akerhielm, who gave evidence at the trial, and the second defendant Ole Beyer who did not.

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[47] 41 Ch.D. 348, 357.

[48] [1897] 1 Ch. 796, 826, 829; 13 T.L.R. 302.

[49] (1869) L.R. 4 Ch. 772.

[50] 14 App.Cas. 337.

[51] [1891] 2 Ch. 449, 474.

The second branch of this first question only arises if the defendants fail to secure a negative answer to the first.

The second question is whether the circumstances of the case are, as the plaintiffs contend, such as to warrant their Lordships in reopening the concurrent findings of the trial judge and the Court of Appeal to the effect that the defendants honestly believed representation (*b*) to be true; and, if so, whether a finding to the effect that they did not honestly so believe would be justified on the facts.

If the defendants succeed on the first question in either of its branches, then the appeal must be allowed unless the plaintiffs succeed on both branches of the second question. All else failing, it is still open to the defendants to contend that the representations complained of were true or that they were immaterial and did not induce the plaintiffs' purchases of shares.

Finally, the defendants contend that even if the decision of the Court of Appeal is held to have been right in other respects the damages awarded by that court are excessive.

[Having stated the facts and referred to the relevant documents his Lordship said that, assuming, without deciding, that representation (*b*) was not wholly true, their Lordships might say at once that they saw no sufficient reason for disturbing the concurrent findings of Corrie J. and the Court of Appeal in favour of the defendants on that point.]

On the question whether representation (*c*) was true or false, the plaintiffs' main argument was to the effect that the word "subscribed" in the circular letter meant "subscribed in cash" and in support of this proposition they relied on *Arnison* v. *Smith*.[1] The learned trial judge rejected this contention, saying that it was clear that the "Capital already Subscribed" included shares issued for considerations other than cash.

Briggs J.A. in the Court of Appeal agreed that representation (*c*) did not mean that one-third of the capital had already been subscribed in cash, so that it could not be held false on the ground that the 70,000s. of capital referred to in the "specification of capital required," or some part of it, was in fact to be issued for consideration other than cash, but also agreed that it could not be said that the whole of this 70,000s. of capital was in fact to be subscribed "in Denmark." Representation (*c*) was thus held false on the narrow ground that while the representation as to the amount of capital already subscribed was correct the representation that this amount had already been subscribed "in Denmark" was untrue.

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[1] (1899) 41 Ch.D. 348; 5 T.L.R. 413.

Their Lordships agree on both points. It seems to them impossible to maintain that the defendants and Von Huth could not, consistently with the representation, pay (for example) the formation expenses by allotting fully paid shares of the appropriate nominal amount to the persons to whom the expenses were payable instead of issuing shares to a like nominal amount for cash and paying the cash so raised to those persons, or by allotting fully paid shares to the appropriate nominal amounts to Muritas A/S or Von Huth in respect of the patent rights. On the other hand, their Lordships cannot regard the words "subscribed in Denmark" as apt, according to their ordinary meaning, to include shares allotted as fully paid to persons resident in Kenya for services rendered in Denmark in connection with the formation of the company.

The only witness called on the defendants' side was the Baron, and accordingly the question whether the defendants honestly believed representations (*b*) and (*c*) or either of them to be true depended before the trial judge not only on the content of the Baron's evidence but also in great measure on the view formed by the trial judge of the Baron's credibility as a witness and honesty as a man, after seeing and hearing him give his evidence.

Their Lordships would observe, first, that there was no cross-examination of the Baron as to the honesty of his belief in the truth of representation (*c*) that "about one-third of the capital" had "already been subscribed in Denmark," or the sense in which according to his evidence in chief he understood that statement; and, secondly, that on a perusal of the Baron's evidence as a whole it is in their Lordships' judgment impossible to hold that there was no evidence upon which the trial judge and the Court of Appeal could find, as they did concurrently find, that the Baron honestly believed representation (*b*) as to the patent rights to be true, whether or not objectively considered it was wholly true.

The Court of Appeal, considering themselves as free on the grounds they stated to go behind the judge's conclusion that the defendants honestly believed representation (*c*) to be true, based though it was (so far at all events as the Baron was concerned) essentially on his acceptance of the Baron as an honest man and a witness of truth after hearing and seeing the Baron give his evidence, proceeded without these advantages to form their own opinion upon this vital issue.

In their Lordships' view the Court of Appeal erred in taking this course. Their Lordships are of opinion that neither the trial judge's comment on the plaintiffs' omission to call Hollister [the solicitor to the company when it had been formed] nor the fact that Hollister was not called by the defendants afforded sufficient ground to justify the Court of Appeal in reversing the trial judge's view, formed after seeing and hearing the Baron give his evidence, that the Baron did honestly believe representation (*c*) to be true.

On the assumption that contrary to their Lordships' opinion the Court of Appeal were justified in substituting their own conclusion for that of the judge on the question of honest belief, the conclusion so substituted appears to their Lordships to be open to the criticism that the Court of Appeal construed the language of representation (*c*) as they thought it should be construed according to the ordinary meaning of the words used, and having done so went on to hold that on the facts known to the defendants it was impossible that either of them could ever have believed the representation, as so construed, to be true. Their Lordships regard this as a wrong method of approach. The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made. This general proposition is no doubt subject to limitations. For instance, the meaning placed by the defendant on the representation made may be so far removed from the sense in which it would be understood by any reasonable person as to make it impossible to hold that the defendant honestly understood the representation to bear the meaning claimed by him and honestly believed it in that sense to be true. But that is not this case. It cannot be said that representation (*c*) could not have been understood by any reasonable person in the sense attributed to it by the Baron in his evidence, or that it was impossible that he should honestly have understood it in that sense, and honestly believed it in that sense to be true. He gave evidence to the effect that he did understand representation (*c*) in that sense, and did honestly understand it in that sense to be true, and was not cross-examined on either of those points. (For the general proposition that regard must be had to the sense in which a representation is understood by the person making it, see *Derry* v. *Peek* [2]; *Angus* v. *Clifford* [3]; *Lees* v. *Tod*,[4] which authorities must, in their Lordships' view, be preferred to *Arnison* v. *Smith* [5] so far as inconsistent with them.)

But this aspect of the matter need be pursued no further. Suffice it to say that their Lordships are satisfied that this is not one of those exceptional cases in which an appellate court is justified in reversing the decision of a judge at first instance when the decision under review is founded upon the judge's opinion of the credibility of a witness formed after seeing and hearing him give his evidence (see as to this *The Hontestroom* [6]; *Watt* (*or Thomas*) v. *Thomas* [7]; *Yuill* v. *Yuill* [8]; *Benmax* v. *Austin Motor Co. Ltd.*[9]). Their Lordships can hardly imagine a case in which the credibility of a witness could be more vital than a case like the present where the claim is based on deceit, and the witness in question is one of the defendants charged with deceit. Their Lordships would add that they accept, and would apply in the present case, the principle that where a defendant has been acquitted of fraud in a court of first instance the decision in his favour should not be displaced on appeal except on the clearest grounds (see *Glasier* v. *Rolls* [10]).

For all these reasons their Lordships are of opinion that the Baron should succeed in this appeal.

The case against the second defendant, Ole Beyer, is, as the judge pointed out, on a different footing, in that he did not give evidence. He is, however, entitled to rely on the evidence of the Baron and its acceptance as establishing the Baron's honest belief in the truth of representation (*c*). He is also entitled to rely on the fact that Hollister was consulted. It is improbable that if the Baron was honest Beyer was fraudulent in the common enterprise in which they were both engaged. The Baron signed the circular honestly believing its contents

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[2] (1889) 14 App.Cas. 337; 5 T.L.R. 625.

[3] [1891] 2 Ch. 449; 7 T.L.R. 447.

[4] (1882) 9 Rettie 807, 854.

[5] (1889) 41 Ch.D. 348; 5 T.L.R. 413.

[6] [1927] A.C. 37; 42 T.L.R. 741.

[7] [1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582.

[8] [1945] P. 15, 19; 61 T.L.R. 176; [1945] 1 All E.R. 183.

[9] [1955] A.C. 370; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326.

[10] (1889) 42 Ch.D. 436, 457; 5 T.L.R. 691.

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to be true, and the reasonable inference is that Beyer signed it in the same frame of mind. It is improbable that if Beyer had any fraudulent intent in this matter he any more than the Baron would have employed a solicitor, unless, indeed, he had it in mind to deceive the solicitor as well as the recipients of the circular. Moreover, according to the Baron's evidence, the figures were supplied by Von Huth. In all the circumstances their Lordships see no sufficient reason for differing from the judge in his conclusion that the case against Beyer had not been made out.

Accordingly, their Lordships are of opinion that in his case also the appeal should succeed.

For the reasons above stated their Lordships will humbly advise Her Majesty that this appeal should be allowed, the judgment of the Court of Appeal for Eastern Africa set aside and the judgment of the Supreme Court of Kenya restored. The respondents must pay the costs of this appeal and the appeal to the Court of Appeal for Eastern Africa.

Solicitors: *Clifford-Turner & Co.; Gordon Dadds & Co.*

C. C.

[HOUSE OF LORDS.]

SKEGNESS URBAN DISTRICT COUNCIL . Appellants;
AND
DERBYSHIRE MINERS' WELFARE COMMITTEE . . . . . . Respondents.

H. L. (E.)*
1958
Dec. 15, 16, 17.
1959
Mar. 24; *April* 30.

Rates and Rating—"Social welfare"—Health—Miners' welfare holiday camp—Premises occupied by trustees—Organisation not established or conducted for profit—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

By section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, rating relief was granted in respect of any hereditament which in terms of subsection (1) (*a*) was "occupied for "the purposes of an organisation . . . which is not established or "conducted for profit and whose main objects are charitable or

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* *Present*: Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Keith of Avonholm and Lord Denning.

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"are otherwise concerned with the advancement of religion, education or social welfare."

A hereditament was occupied for the purpose of a holiday centre for coal mine workers in Derbyshire. The camp, which was managed by trustees, was provided by the social welfare organisation set up under section 13 of the Miners' Welfare Act, 1952, which obtained the necessary funds from the National Coal Board. The trustees sought to make neither a profit nor a loss. Coal mine workers, their wives and children, were accommodated, paying certain charges:—

Held, that the provision of a holiday centre, the main object of the organisation which occupied the hereditament, was "the "advancement of . . . social welfare" and, accordingly, rating relief should be granted in respect of them.

The artificial considerations which distinguished the law of charity were not to be imported into the latter half of the subsection.

Decision of the Court of Appeal [1958] 1 Q.B. 298; [1957] 3 W.L.R. 1048; [1957] 3 All E.R. 692 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Romer and Ormerod L.JJ.).

This was an appeal from an order of the Court of Appeal dated December 19, 1957, after a hearing on November 13 and 17, 1957, dismissing an appeal by the appellants, the Skegness Urban District Council, from an order of the Divisional Court of the Queen's Bench Division (Lord Goddard C.J., Hilbery and Donovan JJ.) made on May 15, 1957, reversing an order of the general court of quarter sessions in and for the County of Lincoln (Parts of Lindsey) made on September 18, 1956. The order of the court of quarter sessions had dismissed an appeal by the respondents, the Derbyshire Miners' Welfare Committee, against their rating for general rating purposes for the urban district of Skegness as the occupiers of certain premises described as a holiday camp and premises numbered 4029 in the rate book for the year ending March 31, 1957, and claiming that they were entitled in respect of that hereditament to the benefit of the relief against rates provided by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. By order of the Divisional Court the appeal was to be allowed and judgment was to be entered at quarter sessions for the respondents in lieu of the order of quarter sessions that the appeal should be dismissed.

Before the passing of the Act and apart from certain specific statutory exceptions not relevant to this appeal, no charitable or kindred organisation could claim as of right to be relieved from any liability to pay the general rate on any property occupied by

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the organisation. It was, however, the practice in some rating areas for the rating authority to make sympathetic assessments on charitable organisations as a matter of grace.

The facts are fully stated in the opinion of Viscount Simonds.

Sir Arthur Comyns Carr Q.C. and *Charles Scholefield* for the appellants.

Geoffrey Cross Q.C. and *J. M. Milne* for the respondents.

Dec. 15, 16, 17. *Sir Arthur Comyns Carr Q.C.* The respondent committee is the inheritor of duties originally imposed by the Mining Industry Act, 1920. Under the Act a compulsory levy was imposed on colliery owners. A fund was formed out of the levies for certain purposes of miners' benefits. A committee was established to administer the fund nationally and had power to appoint local committees in appropriate areas. By the Mining Industry Act, 1926, a further levy was imposed on royalty owners. By the Coal Industry Nationalisation Act, 1946, all colliery undertakings were nationalised. There was transferred to the National Coal Board the obligation to pay the former levies and to administer the fund so formed for broadly the same purposes. By the Miners' Welfare Act, 1952, the Miners' Welfare Committee was dissolved and the fund was wound up. All property was divided into two portions to be applied respectively to (a) "colliery welfare purposes," and (b) "purposes not being colliery welfare purposes." The premises which formed the subject-matter of this appeal were held for the latter purposes. The property was transferred to the Social Welfare Organisation, which was to carry on social welfare activities as defined by the Act. The National Coal Board was to pay the Social Welfare Organisation by way of grant such sums as were necessary to enable it to carry out its activities. The hereditament the subject of this appeal was provided by the Miners' Welfare Committee and the Social Welfare Organisation out of funds derived as aforesaid.

Thus all the funds for providing the holiday centre were provided by a statutory levy, akin to a tax, which is not a charity or of a nature similar to charity, and is in no way altruistic. A subsidisation, large or small, of a fund by money raised by Act of Parliament is plainly neither a charity nor akin to charity as required by the words " charitable or . . . otherwise " in section 8 (1) of the Act of 1955. That is what was found by quarter sessions: " The purposes of the trust were not otherwise concerned with the advancement of social welfare because social "welfare connotes a benefit to the community and not a benefit "to an individual or a particular class of workpeople employed by "one employer. To confer a benefit on some of the servants of "the National Coal Board by the provision of a summer holiday "at cost is not sufficiently wide to constitute the advancement "of social welfare within the meaning of section 8 of the Rating "and Valuation (Miscellaneous Provisions) Act, 1955." That is a finding of fact. See sections 2 and 3 of the Miners' Welfare Act, 1952, and also section 13. See also *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council.*[1]

The idea of the "altruistic" involves the preliminary notion of a voluntary gift. The trustees, with what they have got, allow a large number of miners and their families to pay reduced prices for their holidays at this place. But one cannot say that there is a gift or that this service is altruistically paid for when the fund comes entirely from money extracted from the taxpayer by Act of Parliament. Further, in considering the element of public benefit, the proper test is not the nexus of common employment among those who are to benefit. As to the notion of the charitable or altruistic in relation to government grants, see *Battersea Borough Council* v. *British Iron and Steel Research Association*; *British Launderers' Research Association* v. *Hendon Rating Authority.*[2] The Government cannot concern itself with social welfare "charitably or otherwise," since that requires a voluntary gift. The result of the decision of the court below might be that local authorities could exempt many of their own enterprises from rates. The only thing that prevents them is that these are not "charitable or otherwise." Most of the things they do are social welfare. The Crown pays no rates but makes payments ex gratia. On the decision below, however, it would be entitled to claim exemption for the whole of the Welfare State. Here there is no gift and, therefore, no charity, nor are the trustees "otherwise concerned with the advancement of social "welfare," since that, too, implies voluntary benevolence.

There is no public benefit and nothing akin to charity. The benefit conferred is not public. It cannot be assumed that the object of the Act in the use of the word "otherwise" was to exclude alike the test of voluntary gifts and the test of public benefit.

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[1] [1959] A.C. 293; [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.

[2] [1949] 1 K.B. 434, 457, 472; 65 T.L.R. 183.

As to public benefit, see *In re Compton*[3]; *Hall* v. *Derby Sanitary Authority*[4] and *In re Hobourn Aero Components Ltd.'s Air Raid Distress Fund.*[5]

When the miners' welfare schemes were founded, the miners were in a state of distress, but now they are not to be assumed to be more poverty-stricken than anybody else. They are not, for charitable purposes, either the community or a section of the community: see *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*[6] One is not entitled to assume that there are as many miners here concerned as there were persons concerned in that case. See also *Williams' Trustees* v. *Inland Revenue Commissioners.*[7]

[*Geoffrey Cross Q.C.* said that the justices proceeded on the footing that the hereditaments were held on the trusts of a scheme made by the Charity Commissioners on February 20, 1953, but in the Divisional Court a lease of the land dated December 4, 1940, was produced for the first time and the case was thenceforward argued and decided on the footing that the trusts declared by the lease were operative, although they were different from the trusts of the scheme. The respondents did not rely on the Recreational Charities Act, 1958, passed as a result of the decision in *Inland Revenue Commissioners* v. *Baddeley.*[8] The case was determined on the point that the respondents' objects were "otherwise concerned with the advancement of . . . social welfare" within section 8 (1) (*a*) of the Act of 1955.]

Sir Arthur Comyns Carr Q.C. The parties here have proceeded by agreement on the footing that the only document to be considered was the lease. If that is not so, other considerations will arise.

To succeed, the respondents must show a public benefit. There can be no difference between public benefit under the law of charities and public benefit in relation to the requirements of section 8 (1) (*a*) of the Act of 1955. The question here is not whether the objects were under the Statute of Elizabeth I, but concerns the nexus binding the beneficiaries together. These trusts provide a benefit only for a limited class and consequently do not advance social welfare.

As to the construction to be given to the word "otherwise," see *Stag Line Ltd.* v. *Foscolo Mango & Co. Ltd.*[9] on the meaning to be given to the expression "other purposes."

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[3] [1945] Ch. 123, 130 et seq.; 61 T.L.R. 167; [1945] 1 All E.R. 198.

[4] (1885) 16 Q.B.D. 163; 2 T.L.R. 81.

[5] [1946] Ch. 194, 200–201, 202, 203, 206, 208, 210; 62 T.L.R. 313; [1946] 1 All E.R. 501.

[6] [1951] A.C. 297, 306; [1951] 1 T.L.R. 118 [1951] 1 All E.R. 31.

[7] [1947] A.C. 447, 456; 63 T.L.R. 352; [1947] 1 All E.R. 513.

[8] [1955] A.C. 572; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525.

Charles Scholefield following. Ultimately the question is whether the words in section 8 (1) (*a*) are to be given as wide a meaning as possible or whether some limitation must be placed on them. The appellants rely on *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council.*[10]

Only shops and office premises are rated at their full value under the Act of 1955, but the exemptions do not mean that the rating authority loses a corresponding amount; it calculates its expenditure and spreads it over the body of ratepayers. Others bear the burden which persons who get the benefit of exemptions do not bear. Parliament had in mind the increase of assessments on revaluation. It was aware that there are many charities in this country and that if there were to be imposed on them a sudden swingeing increase they would be put in difficulties. The Act gives them a three years' breathing space. The approach to this section should be narrow rather than wide because of the extra burden it imposes on other ratepayers who are also hard-pressed. The privileges accorded to charities should be restricted to organisations which are genuinely for the public benefit: see the *Hobourn* case.[11] The intention of the Act was that good objects in the public benefit should not be hampered by a sudden increase of rates. The social welfare activities envisaged by section 13 of the Miners' Welfare Act, 1952, do not come within the scope of the Act of 1955. The position is different from that of an organisation supported by voluntary contributions.

Further, "the advancement of . . . social welfare" in section 8 (1) (*a*) indicates something with a capital S and a capital W. The phrase looks to the advancement of the conception of man looked after by man, the whole body politic, not merely to the advancement of a small body of individuals. In cases like this it is important to see what is included and what is excluded. The Guards Club is concerned with the social welfare of its members, but it excludes everyone who is not an officer of the Brigade of Guards. If one is only advancing the social welfare of a certain number of favoured individuals, it matters not in principle whether they are miners or Guards officers. The test of social welfare is whether it is looking at a man—any man—and he has needs. Admittedly social welfare in this sense can be localised, for instance, confined to Derbyshire. But here the respondents are not concerned with social welfare; they are merely providing a holiday centre.

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[9] [1932] A.C. 328, 345; 48 T.L.R. 127.

[10] [1959] A.C. 293.

[11] [1946] Ch. 194, 208–209.

[Viscount Simonds. Mr. Cross, your clients are trustees who hold on the trusts of the scheme made by the Charity Commissioners. If it had been an order of the Chancery Division would you ask us to disregard it?

Geoffrey Cross Q.C. If I failed on social welfare I should fail on charity too.

Viscount Simonds. It does not follow that the Attorney-General would fail in maintaining that there was a good charitable scheme.

Geoffrey Cross Q.C. For the purposes of this litigation I am prepared to have the matter decided on the footing that this is not a charitable trust. Otherwise it would have to go back to quarter sessions.

Viscount Simonds. We cannot disregard the existence of the scheme. Have the Charity Commissioners been told that this scheme has been treated as a nullity?

Geoffrey Cross Q.C. They are aware what quarter sessions have done, but have not been invited to take action.

Lord Reid. The trustees here are trustees under the scheme, not under the lease. How can you say that your clients, not being trustees under the lease, can rely on the lease?

Geoffrey Cross Q.C. I only invite the House of Lords to deal with the matter, not on the footing that the trusts were charitable, but on the ground of social welfare.

Lord Morton of Henryton. The trusts are not the same.

Sir Arthur Comyns Carr Q.C. The scheme was the only thing that quarter sessions was told about.

Viscount Simonds. We can do nothing unless the Charity Commissioners say whether they are prepared to defend this scheme as charitable.

Geoffrey Cross Q.C. Could not the House deal with the matter on the footing on which it was dealt with below?

Viscount Simonds. If the scheme is valid, the trusts are charitable.

Lord Reid. I do not see how you can go back to the lease at all if the scheme is valid.

Lord Morton of Henryton. There are three alternative courses open: First, to go on with the case and decide it on the assumption that the trusts of the lease apply; secondly, to adjourn in order to hear the Charity Commissioners; thirdly, to hear the rest of the argument without deciding what we are going to do until we have heard the Charity Commissioners.

VISCOUNT SIMONDS. We shall not give a final decision in this case until we have heard the Charity Commissioners, but we shall hear the argument out and put the case in the list next sittings for the Charity Commissioners to appear.]

Geoffrey Cross Q.C. For the respondents to succeed, the first requisite to be fulfilled is that there must be a benefit from an outside source. Thus one excludes cases where persons enjoying the amenity in question pay for it themselves, either directly or indirectly, in the sense that the cost is met from a fund contributed to by themselves, that is, by the members or the past members of the organisation. Next, the provision of the benefit in question must confer a benefit on the public. That would eliminate cases where the nature of the benefit was doubtful or where the class of beneficiaries was such (for instance, a person's own relations) that it could not be said that the public was interested. The courts must have regard to the nature of the class.

In the present case there is the provision of a benefit from outside. A substantial subsidy has been made, and the fact that something is also paid by the beneficiaries does not prevent the benefit from falling within the class of "social welfare." This benefit is concerned with a whole industry and cannot be judged as one would judge the provision of a holiday camp for members of a particular firm. In these cases everything depends on the particular facts. The genesis of this benefit is an Act of Parliament, clearly indicating that the legislature thought that it was in the public interest. Purpose is the test of public benefit and not the source of the funds: see Halsbury's Laws of England, 3rd ed., vol. IV, p. 232, para. 513, where *Attorney-General* v. *Eastlake* [12] is cited. "Social welfare" is well defined in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council.*[13] When one leaves charity and comes to social welfare, one is no longer in the field of poverty; it is a question of degree. Before nationalisation of the coal industry the coal miners of Derbyshire would have been a good charitable class: see *Oppenheim's* case.[14] But in considering social welfare one is not tied to considerations relating to charities. In 1955 the receipts for accommodation at the holiday camp were over £68,000, which shows that a great many people availed themselves of it.

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[12] (1853) 11 Hare 205.

[13] [1959] A.C. 293, 322.

[14] [1951] A.C. 297.

As to the argument that there had been a finding of fact by quarter sessions conclusive against the respondents, this was dealt with by Ormerod L.J. in the Court of Appeal.[15]

This is not a case of providing for one's own family or workpeople, where there is self-interest, but of providing for the public interest. The questiòn of self-interest does not arise in the case of a nationalised industry. The question to be considered is: Is it in the public interest that this benefit should be conferred on the class in question?

The fact that a compulsory levy was imposed under the Mining Industry Acts is immaterial. The money paid to the respondents did not come directly from the taxes but from the welfare committee. In any event, these considerations do not prevent the benefit conferred from being " social welfare."

The class here is adequate and, apart from that, social welfare is not tied strictly to the rules of the law of charities.

J. Malcolm Milne following. The words of the section are " occupied for the purposes of " and not " occupied by," and so there is a distinction inherent in section 8 (1) (*a*) between the provision, say, of a canteen by an ordinary employer for his employees to assist his business by keeping them happy and contented, and the provision of canteens by the Coal Board which, having no competitors, has not the same motive. Canteens provided by an ordinary employer would, even if occupied by trustees, be occupied for the purposes of the employer's business.

It was always conceded that these premises were occupied for the purposes of the respondents and not of the Coal Board.

By the proviso to section 8 (1) Parliament has expressly excluded premises occupied by local authorities and therefore had in mind the case of contributions which might not be voluntary.

Sir Arthur Comyns Carr Q.C. in reply. It is not clear what persons here constitute the organisation. It cannot be the lessees under the lease unless the scheme made by the Charity Commissioners has amalgamated the lessors and the lessees, so that this is now an owner-occupier hereditament. If the scheme is effective, it has not been carried out and, if it has superseded the lease, some other body, which we have never heard of, occupies the premises. This adds to the confusion in this case and later on may produce difficulties.

[15] [1958] 1 Q.B. 298, 309.

The respondents' argument has dealt with the provision of social welfare, but not with its "advancement." There is a distinction. Here nothing has been done to advance anything. The respondents have only provided this holiday camp. But under the Act there must be advancement as well as provision. Butlin's camps provide amenities, but they do not advance social welfare. A butcher provides meat, but an agricultural society promotes the advancement of the production of good meat. The respondents are only different from Butlin's organisation in that they are not profit-earning.

As to the correctness and effect of *Attorney-General* v. *Eastlake*,[16] it is not contended by the appellants that the decision itself was wrong, but it is based on wrong grounds and on a misunderstanding of the earlier case of *Attorney-General* v. *Dublin Corporation*[17] in the House of Lords. It is no authority for the proposition that a fund constituted, not by any gift, but by an Act of Parliament, can ever be charitable. Save, perhaps, in the case of a private Act of Parliament, one can never have a charitable trust if the fund is provided by taxation. Nothing in what Lord Eldon said in *Attorney-General* v. *Dublin Corporation*[18] is inconsistent with *Attorney-General* v. *Heelis*.[19]

Reliance is placed on the definition of "charity" by Lord Hardwicke L.C. in *Jones* v. *Williams*[20] quoted by Lord Simonds in *Oppenheim's* case.[21] A gift and a public purpose are fundamental to the conception of charity.

Admittedly in considering the words "or are otherwise con-"cerned," etc., the court is not tied to the charity cases, but it derives guidance from them. The expression "charitable or . . . "otherwise" imports the two being akin.

Here there is no motive for providing the funds except the compulsion of a statute. The Coal Board has just as much interest in keeping its employees content as a private employer. Here there is not a good outside source of the fund and there is no gift.

The respondents relied on the fact that the fund did not come from the taxes directly, but that was equally true in the case of *British Launderers' Research Association*,[22] where the intermediary was the Committee of the Privy Council for Scientific and Industrial Research.

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[16] 11 Hare 205.

[17] (1827) 1 Bligh N.R. 312, 334 et seq., 341, 347, 352, 356.

[18] Ibid. 356–357.

[19] (1824) 2 S. & S. 67.

[20] (1767) 2 Amb. 651.

[21] [1951] A.C. 297, 305.

[22] [1949] 1 K.B. 434.

The effect of the words "occupied for the purposes of an "organisation" in section 8 (1) (*a*) is the same as "occupied by."

The respondents claim exemption from rates as being in occupation of the premises for certain purposes, but they are not so entitled because they are not acting in accordance with their trusts.

March 24, 1959. *John Brunyate* for the Charity Commissioners. The commissioners concede and accept that the trusts declared by the lease of 1940 are not charitable, but the scheme was framed on the footing that that lease would be surrendered. Paragraph 5 of the scheme of 1953 reads: "The charity and the "endowments thereof shall be administered and managed for the "object following that is to say—The provision and maintenance "of a convalescent home for workers in and about coal mines in "the district of Derbyshire (exclusive of South Derbyshire) and "subject thereto the provision and maintenance of a holiday "centre for the benefit of persons qualified as aforesaid and in "need of a change of air." The main purpose (the provision and maintenance of a convalescent home) is charitable. The subsidiary purpose (the provision and maintenance of a holiday centre) is also charitable as qualified, that is, for Derbyshire miners, but, if it were held not to be charitable, only the subsidiary purpose would fail and the main purpose would remain.

From time to time the Charity Commissioners have been asked to deal with cases where the charitable nature of a scheme is open to doubt. At the time of the scheme of 1953 the charitable nature of the holiday centre was in doubt. Later *Baddeley's* case [23] suggested that it was not charitable.

If a scheme, possibly sanctioned by the court, for the administration of a charitable fund directed its use for a certain purpose which afterwards turned out not to be charitable, the trustees would, in strict law, be in breach of trust, although they would have a defence to an action. The court could then be approached for a new scheme which indicated a charitable purpose.

The commissioners are here to explain the position as to the validity of the scheme they have made. Save as regards certain parcels of land described in the schedule to the scheme, they exercised their jurisdiction validly, but, provided their position is not prejudiced, they are content that the matter should be dealt

[23] [1955] A.C. 572.

with on the assumption that at the material times the respondents occupied the land on the trusts declared in the lease of 1940.

Sir Arthur Comyns Carr Q.C. The appellants are content that this case should be decided on the footing that the respondents are occupiers of the land and hold on the trusts of the lease of 1940.

As to the application of the principle stare decisis, see *City of Westminster* v. *Southern Railway Co.*[24] and *Robinson Brothers (Brewers) Ltd.* v. *Durham Assessment Committee.*[25]

Geoffrey Cross Q.C. The respondents also are content that the case should be decided on the footing indicated.

Their Lordships took time for consideration.

1959. April 30. VISCOUNT SIMONDS. My Lords, the short question in this case is whether the respondents, a body known shortly as the Derbyshire Miners' Welfare Committee, as the occupiers of a certain hereditament in the urban district of Skegness, which I will describe later, are entitled to the benefit of the relief against rates provided by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. This question has been decided in their favour by the Court of Appeal affirming a decision of a Divisional Court of the Queen's Bench Division. The contrary had been decided by the general court of quarter sessions in and for the County of Lincoln (Parts of Lindsey).

It will be convenient to refer first to the relevant statutory provision, but I will remind your Lordships that previously no charitable or kindred institution (with certain immaterial exceptions) could as of right claim exemption from any general rate. Some rating authorities had, however, been accustomed to make sympathetic assessments on charitable organisations as a matter of grace. Uniformity was introduced by the subsection to which I have referred. It provided as follows: "(2) For the purposes "of the making and levying of rates in a rating area, for the "year beginning with the date of the coming into force of the "first new valuation list for that area (in this section referred "to as 'the first year of the new list'), and for any subsequent "year, the amount of rates chargeable in respect of a heredita- "ment to which this section applies shall, subject to the following

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[24] [1936] A.C. 511; 52 T.L.R. 541; [1936] 2 All E.R. 322.

[25] [1938] A.C. 321; 54 T.L.R. 568; [1938] 2 All E.R. 79.

" provisions of this section, be limited as follows, that is to say: " (*a*) for the first year of the new list, the amount so chargeable " shall not exceed the total amount of rates (including any " special rates) which were charged in respect of the hereditament " for the last year before the new list came into force; . . ."

Subsection (1) of the same section was as follows: " This " section applies to the following hereditaments, that is to say: " (*a*) any hereditament occupied for the purposes of an organisation " (whether corporate or unincorporate) which is not established " or conducted for profit and whose main objects are charitable " or are otherwise concerned with the advancement of religion, " education or social welfare; . . ."

Uniformity was further secured by the fact that by the Local Government Act, 1948, the duty of making and amending valuation lists was transferred from the rating authority to the Valuation Officers of the Commission of Inland Revenue. The first general revaluation undertaken by them became effective on April 1, 1956, from which date also the present claim to relief took effect.

My Lords, though I have been able to state the question very shortly, I find the facts extremely obscure.

In the rate book for the year ending March 1, 1956, the respondents were shown as the occupiers of the hereditament in question described as " holiday camp and premises " with a rateable value of £1,476 and the rate payable was £1,758 18s. 0d. In the following year they were shown as occupiers of the same hereditament but the rateable value was shown as £3,800 and the amount of rate as £3,040. Against this assessment they duly appealed to quarter sessions and I have already stated the result of the proceedings up to the appeal to this House.

So far all is clear, but, when I come to the case stated by the justices, upon which the appeal proceeded, I find a great deal of confusion. I do not seek to apportion the blame for this state of affairs except to say that it would not be fair to lay any responsibility for it upon the justices or their clerk. In paragraph 8 of the case it was said that the following facts were proved or admitted (I paraphrase them) (i) that the respondents were in fact the trustees of a trust known as the Derbyshire Miners' Welfare Convalescent Home and Holiday Centre; (ii) that " the " Derbyshire Miners' Welfare Committee " was the short name by which they were generally known; and (iii) that they at all material times occupied the hereditament in question (and a

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further hereditament used as a convalescent home) for the purpose of a convalescent home and holiday centre for the use of workers in and about coal mines in Derbyshire (exclusive of South Derbyshire). Details of the hereditament with particulars of the buildings upon it were then given, and it was stated that the camp was provided by the social welfare organisation set up under section 13 of the Miners' Welfare Act, 1952, which obtained the necessary funds from the National Coal Board. It was further found that the organisation only made grants for capital expenditure and that it had always been their practice in doing so to make it a condition that the trustees would be responsible for maintenance and operational expenses. They further found that it was being run by trustees who sought to make neither a profit nor a loss on their operations. It is to be noted that this finding has not been challenged. They found also that the trust was the subject of an order made by the Charity Commission on February 20, 1953, and they referred to various admissions of which I may mention these, that the only persons attending the holiday centre were workers in or about coal mines in the district of Derbyshire (excluding South Derbyshire), their wives and children, but that, if all the vacancies were not filled by these persons, they were filled by applicants from other coal fields, that generally there were no vacancies left to be filled by applicants from other coal fields, that a charge varying from £5 15s. 0d. for an adult to £1 10s. 0d. for a small child was made for a week's holiday accommodation and full board, which charge included the return rail or omnibus fare from the visitor's home to Skegness, and that drinks and other refreshments were sold to persons staying at the holiday centre, alcoholic drinks being acquired by such persons as members of a club and in the winter by local residents who became members of the club, and that a substantial profit was made out of the supply of drink, but that the charge for accommodation was so fixed that, taking all the operations together, the trustees made neither a profit nor a loss.

I need not state the contentions of the parties before the justices beyond saying that the respondents contended that the purposes of the trust were charitable or (alternatively) were concerned with the advancement of social welfare, while the appellants denied both contentions.

The justices were of opinion that the purposes of the trust were not charitable and were not otherwise concerned with the advancement of social welfare.

I call attention to the fact that the justices proceeded on the footing that the trust upon which the hereditament was held was that created by the scheme made by the Charity Commissioners but nevertheless thought that they were not thereby precluded from saying that it was not charitable.

But, my Lords, when upon appeal the case reached the Divisional Court, for the first time, it was said, and not denied, that the governing document was not the scheme made by the Charity Commissioners but a lease of December 6, 1940, which had not been produced at the hearing before the justices, and it was upon the footing that the trusts declared by this lease were operative that the appeal was thenceforward argued. The scheme was ignored. No communication appears to have been made either to the Charity Commissioners or to the Attorney-General. This was an irregular course upon any view, but the more irregular because the trustees, abandoning the scheme, abandoned also the argument that the trust upon which the property was held was charitable. For the trust declared by the lease could not (apart possibly from the validating effect of the Recreational Charities Act, 1958) be so regarded. Counsel for the trustees were in fact content to rest their case on the alternative claim that the hereditament was occupied " for the purposes of an organisation . . . " which is not established or conducted for profit and whose main " objects are . . . otherwise concerned with the advancement of " . . . social welfare," and they may perhaps regard the success that has so far attended them as justifying that course. I have felt some doubt whether, even at this stage, it would not be the proper course to remit the case to quarter sessions for a restatement of the case, and I should have had no hesitation in advising your Lordships to do so if I had not been of opinion that the appeal must in any event fail. As matters stand, I propose therefore to deal with the case as it has been presented to the House.

It is necessary, then, to turn to the lease of December 6, 1940. The parties thereto of the first part, the lessors, were a number of persons described as " the trustees on behalf of the Derbyshire " District Miners' Welfare Committee " and the parties of the second part thereinafter called " the trustees " were a number of persons described as " the trustees on behalf of the Derbyshire " District Miners' Holiday Centre." It recited that by section 20 of the Mining Industry Act, 1920, a fund was established, which was thereinafter called the " miners' welfare fund," to be applied to purposes connected with (inter alia) the social well-being, recreation and conditions of living of workers in or about coal mines, and the duty of allocating money from the said fund was vested in the committee, thereafter called " the Miners' Welfare " Committee," appointed under subsection (3) of the said section as varied by section 1 of the Mining Industry (Welfare Fund) Act, 1939, and section 15 of the Mining Industry Act, 1926, that a committee styled the " Derbyshire District Miners' Welfare Committee " constituted as therein mentioned had been set up to advise the Miners' Welfare Committee in regard to allocations from the said fund for the purposes aforesaid within the said district and that the latter committee had on the advice of the former allocated a sum of £35,000 for the purpose of providing a holiday centre for the use and benefit of workers in or about coal mines and more particularly such of them as were resident in the Derbyshire district, and that the trustees had been appointed to administer the said sum and such other sums, if any, as might thereafter be allocated, given or bequeathed, for the purposes of the trusts thereinafter declared. It was then, by the deed, witnessed that the lessors demised the hereditament which is the subject-matter of this appeal to the trustees for the term of 21 years from January 1, 1939, at a yearly rent of £200. The trustees entered into the usual lessee's covenants and, after a number of other provisions which need not be stated, they declared that they would " permit the demised premises to be used " for the purpose of a holiday centre and a recreation or pleasure " ground for the benefit of workers in or about coal mines em-" ployed by collieries in the Derbyshire district (including the " dependants and invitees of such workers)." The lease also contained a provision in regard to keeping accounts and methods of charging which were relevant to the question whether the " organisation " was " established or conducted for profit " but, as that is not now suggested, it need not be further stated.

Much still remains obscure. It is not clear what was the relation of the parties to the lease to each other, nor in whom the hereditament was originally vested. It does not appear either from the recitals in the lease or from the case stated how the sum of £35,000 mentioned in the recitals was in fact expended, nor do the voluminous accounts which were put in evidence give any sure guide. I will, however, assume, as it has throughout been assumed, that this sum was in some way, either by purchase of the land or by the erection of buildings upon it, expended for the purpose of a camp and holiday centre and that those who made use of it therefore got a benefit which could not be regarded as unsubstantial. I can also assume—and in this respect some assistance can be derived from the case stated—that upon the passing of the Miners' Welfare Act, 1952, the property passed to a body set up under that Act and called "the Social Welfare "Organisation" to which the National Coal Board was under an obligation to pay sums necessary to meet the estimated costs of social welfare activities. These activities were defined as meaning "activities concerned with the maintenance or improve- "ment of the health, social well-being, recreation, or conditions "of living of persons employed in or about coal mines" or their dependants. It is also pretty clear that the sum of £35,000 to which I have referred was not derived from any voluntary contributions but was the fruit of a compulsory levy and that any other sums that may be necessary for the maintenance of the camp, so far as it is not met out of charges to the beneficiaries, are provided by the National Coal Board. It is this fact upon which the appellants largely rely.

My Lords, I turn again to the relevant section and note first the curious wording "occupied for the purposes of an organisa- "tion . . . whose main objects," etc. It is by no means clear to me what is the "organisation" whose main objects have to be considered. Is it the "Social Welfare Organisation" set up under the Act of 1952 to which I have already referred? Or is it the body of trustees who appear in fact to manage the holiday centre, or is it a committee, whether the Miners' Welfare Committee which has been mentioned or some other committee? It is not a satisfactory way of disposing of the case, but I see no alternative to saying that, whatever the "organisation" may be, its main object is nothing else than the provision of a holiday centre such as is described in the case. If so, the question is whether such a provision is concerned with the advancement of social welfare.

My Lords, this question surely admits of only one answer. I agree with what has been said by Donovan J. and Ormerod L.J. on this point. It is unnecessary and probably impossible to give a comprehensive definition of social welfare. But it would be a strange definition which was not wide enough to include what is, under modern conditions, widely regarded as so important to happiness and general well-being as a so-called holiday centre. If this is so, why is not the hereditament here in question entitled to the benefit of the section? The alleged reasons appear to be these.

In the first place, the appellants rely, as I have already indicated, on the fact that the holiday centre was provided and

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maintained by a statutory levy or by contributions from the National Coal Board so far as it was not provided and maintained at the expense of those who made use of it. They urge that a trust or institution cannot be regarded as charitable if it is not created by the benevolence of a donor or donors and that that element is absent in the present case. Next, they say, that just as benevolence or altruism is a necessary element in legal charity, so an object of an organisation cannot be regarded as "otherwise "concerned with the advancement of social welfare" unless it too has such an element. I accept neither of these propositions. The crucial test is the purpose to which money is devoted, not the source from which it is derived, see *Attorney-General* v. *Eastlake.*[1] An elaborate argument was addressed to us to show that the decision in that case was based on a misunderstanding of what Lord Eldon said in *Attorney-General* v. *Dublin Corporation.*[2] But, whether this be so or not, the decision has never, so far as I know, been questioned, and I think it was clearly right.

In the next place, the appellants argued that the provision of a holiday centre in the present case did not advance social welfare because it provided a benefit for only a limited class in the community. Once again recourse was had to the analogy of charity law, and *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*[3] and similar cases were invoked to support this proposition. I make the answer that I made to the first argument. There is no justification for supposing that the legislature intended to import the highly artificial considerations, which distinguish or disfigure the law of charity, into the latter part of the subsection. Neither the words themselves nor the context demand it and I think that all the court has to do is to forget all the refinements of charity law and ask itself the simple question that I have already posed. I do not doubt that there will be border-line cases, but it does not appear to me that in the present case the question is difficult to answer.

Thirdly, it was argued that some distinction is to be made between the "advancement" of social welfare and the provision of social welfare and that in the present case the "organisation" whose main object we are considering (whatever that organisation may be) is not the advancement of social welfare but merely the provision of a holiday centre. Upon this point, which seems to me to be little more than playing with words, I will, with respect, adopt what Ormerod L.J. said. The provision of a holiday centre of this nature appears to me precisely to be "concerned with the "advancement of social welfare."

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[1] (1853) 11 Hare 205.

[2] (1827) 1 Bligh N.R. 312.

[3] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

My Lords, before I conclude this opinion, I must revert for a moment to a matter upon which I have already made some observations. I have pointed out that the Divisional Court and the Court of Appeal alike disregarded the fact that a scheme had been made by the Charity Commissioners which, if it was valid, imposed upon the land, the subject of the contested rate, trusts different from those created by the 1940 lease. At the end of the original hearing before this House it appeared to their Lordships that this course ought not to be adopted without at least giving the commissioners an opportunity of being heard. They accordingly adjourned the hearing and at the adjourned hearing the commissioners attended by counsel and contended that, except as to some parcels of land comprised in the scheme, they had validly exercised their discretion. They were, however, willing (as were counsel for the appellants and the respondents) that, so long as their position was not prejudiced, the case should be decided upon the footing that the respondents at the relevant time in fact occupied the land in question upon the trusts created by the 1940 lease, i.e., upon the footing upon which the case was decided in the courts below. In these circumstances, since that is, in any view, the footing most favourable to the appellants, their Lordships agreed to take an unusual and generally undesirable course and decide the case upon what may, after all, prove to be a false assumption.

I have already stated the conclusion to which, upon this footing, they have come. The appeal must be dismissed, but, in dealing with the costs they must have regard to the fact that the respondents did not, until the case reached the Divisional Court, produce the 1940 lease, which then became the most material document, and did not, until the appeal had been opened in this House, produce other documents, which, had they been at the outset made known to the appellants, might have affected their conduct in these proceedings. The order will be that the parties will bear their own costs of this appeal except that the respondents must pay the appellants' costs of the adjourned hearing on March 24. The Charity Commissioners will bear their own costs.

My noble and learned friend, LORD MORTON OF HENRYTON, who is unable to be here today, has asked me to say that he concurs in the opinion which I have just read.

Lord Reid. My Lords, I concur.

Lord Keith of Avonholm. My Lords, I agree with the speech delivered by my noble and learned friend on the Woolsack.

Lord Denning. My Lords, for nearly 40 years the coal industry has built up a special fund for welfare purposes. In the early days it was done by means of a compulsory levy on colliery owners and royalty owners. In recent times it has been done by way of grants by the National Coal Board. The fund has been held and controlled by various bodies, at first by a Miners' Welfare Committee, then by a Miners' Welfare Commission, and latterly by the Coal Industry Social Welfare Organisation. These bodies have all followed one another, each taking over from the one before, so I may perhaps describe them all as the "Social "Welfare Organisation."

The Social Welfare Organisation has applied the fund in promoting the social well-being, recreation, and conditions of living of mine workers. It has done this in accordance with statutory provisions in that behalf. One of the activities which it has supported is a holiday centre at Skegness. This is especially for the use of miners from North Derbyshire. It is situated on an extensive piece of land next to the sea and comprises a holiday camp complete with chalets, kitchen, dining-hall, theatre, bars, lounges, shops and so forth.

The Social Welfare Organisation provided the capital moneys by which this holiday centre was acquired and built. The justices at quarter sessions find that "this camp was provided by the "Social Welfare Organisation." The legal title is not, however, vested in the Social Welfare Organisation. It was at one time vested in a district committee, but it has since been vested in the Official Trustee of Charity Lands: and it is included in a scheme prepared by the Charity Commissioners. The justices at quarter sessions so found, and their findings have, I think, been in substance re-established by the material brought before your Lordships by the Charity Commissioners.

The Social Welfare Organisation has not itself administered or managed the holiday centre. This has been done, under the authority of the scheme, by a committee of eight persons, all of whom are connected with the coal industry in the East Midlands. Four of them are appointed by the employer's side (the National Coal Board) and four by the men's side (the National Union of Mineworkers). These eight persons are described as

"The Derbyshire Miners' Welfare Committee." They are, say the justices, the occupiers of the holiday centre. They are liable therefore for the rates payable on it. They also, I may remark, run a convalescent home next to the holiday centre.

The only persons who use the holiday centre are mine workers and their families. The charge is £5 15s. 0d. for an adult and £1 10s. 0d. for a child. For this they get a week's holiday with full board and return fare to and from Skegness. The charge for accommodation is thus very modest. This is because the committee do not seek to make any profit. Nor do the committee have to pay any rent. And they make a substantial profit on drinks and this is used to lower the charge for accommodation.

Such being the facts, if I were asked: "For what purpose is "the land used? Is it used 'for the advancement of social "'welfare'?" I should probably say "Yes." But I would hasten to point out that the question is not "For *what* purpose is "the land used?" The question is: "For *whose* purpose is it "used?" or more accurately: "For the purposes of *what organisation* is it used, or rather occupied?" Many a holiday camp is used for similar purposes to this one. The holiday camps of Messrs. Butlin provide holidays at low cost for people who could not otherwise afford them, but they do not obtain relief from rates on this score. The reason is because that organisation does not qualify under section 8 (1) (*a*). Again, many convalescent homes obtain relief, but only if the relevant organisation qualifies. The convalescent home in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*[4] did not get relief, because the friendly society did not qualify.

And I would add that it is not always right to take the occupier and treat him as the "organisation." In the case of a members' club, the committee of management occupy the club house, but it is occupied, not for the purposes of the committeemen, but for the purposes of the club itself. The relevant organisation is the club itself—the unincorporated association—and in order to get relief from rates, the club itself must qualify under section 8 (1) (*a*).

What, then, is the relevant organisation in the present case? This is the crucial question, but it does not appear to have been discussed in the courts below. The relevant organisation may be the eight persons on the committee who run the holiday centre. Or it may be the Social Welfare Organisation which has provided,

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[4] [1959] A.C. 293; [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.

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and still provides, all the capital moneys that are needed. But neither of these organisations confine their activities to the holiday centre alone. The main object of the committee of eight, as appears from the scheme, is to provide and maintain a convalescent home for the miners of North Derbyshire, and subject thereto, a holiday centre for them. The main object of the Social Welfare Organisation, as appears from the Act of 1952, is to support and carry out " social welfare activities " throughout the coal industry of this country. But the discussion in the courts below has been on the footing that the relevant organisation (whatever it is) has as its sole object the provision of the holiday centre: and attention has therefore been concentrated on whether that object alone is concerned with the advancement of social welfare. Your Lordships have been invited to deal with the case on this same footing and I suppose you may. All I am concerned to point out is that it is not the right footing. But taking it as the only question, I agree that the provision of this holiday centre is concerned with the advancement of social welfare. It fulfils all the criteria laid down by this House in the case of the *National Deposit Friendly Society*.[4] It is substantially altruistic and benevolent in its purposes and it is for the public benefit. I agree, therefore, that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Wrentmore & Son; Donald H. Haslam for Lawrence C. Jenkins, Nottingham; Treasury Solicitor.*

F. C.

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[4] [1959] A.C. 293.

END OF VOLUME AND OF APPEAL CASES FOR 1959.

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5. —— —— *Health—Miners' welfare holiday camp—Premises occupied by trustees— Organisation not established or conducted for profit—Rating and Valuation (Miscellaneous Provisions) Act*, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

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4. —— —— *War damage—Value payments —Property dealing company—Whether profits or gains for income tax purposes—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I—War Damage Act*, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *ss.* 36, 66, 79, 80 — *War Damage (Public Utility Undertakings, etc.) Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 36), *s.* 28 (1) (4).

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